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Special Issue—Prosecuting Human Trafficking

Editorial: The Problems and Prospects of Trafficking Prosecutions: Ending impunity and securing justice

Two Birds with One Stone? Implications of conditional assistance in victim protection and prosecution of traffickers

Transaction Costs: Prosecuting child trafficking for illegal adoption in Russia

The Prosecution of State-Level Human Trafficking Cases in the United States

Trafficking of Women for Sexual Exploitation in Europe: Prosecution, trials and their impact

The Prominent Role of National Judges in Interpreting the International Definition of Human Trafficking

Debate: 'Prosecuting trafficking deflects attention from much more important responses and is anyway a waste of time and money'

Investments in Human Trafficking Prosecutions are Indispensable

Prioritising Prosecutions is the Wrong Approach

The Importance of Strategic, Victim-Centred Human Trafficking Prosecutions

Resisting the Carceral: The need to align anti-trafficking efforts with movements for criminal justice reform

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Innocent Traffickers, Guilty Victims: The case for prosecuting so-called 'bottom girls' in the United States

Human Rights and Economic Opportunity Will End Trafficking

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ANTI-TRAFFICKING REVIEW

Special Issue

PROSECUTING HUMAN TRAFFICKING

Issue 6 May 2016

The *Anti-Trafficking Review* (ISSN 2286-7511) is published by the Global Alliance Against Traffic in Women (GAATW), a network of over 100 NGOs worldwide focused on advancing the human rights of migrants and trafficked persons.

The *Anti-Trafficking Review* promotes a human rights-based approach to anti-trafficking. It explores trafficking in its broader context including gender analyses and intersections with labour and migrant rights. It offers an outlet and space for dialogue between academics, practitioners, trafficked persons and advocates seeking to communicate new ideas and findings to those working for and with trafficked persons.

The *Review* is primarily an e-journal, published annually. The journal presents rigorously considered, peer-reviewed material in clear English. Each issue relates to an emerging or overlooked theme in the field of anti-trafficking.

Articles contained in the *Review* represent the views of the respective authors and not necessarily those of the editors, the Editorial Board, the GAATW network or its members. The editorial team reserves the right to edit all articles before publication.

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ANTI-TRAFFICKING REVIEW

Issue 6, May 2016

- 1 **Editorial:** The Problems and Prospects of Trafficking Prosecutions: Ending impunity and securing justice
Anne T Gallagher
- Thematic Articles: Prosecuting Human Trafficking**
- 13 Two Birds with One Stone? Implications of conditional assistance in victim protection and prosecution of traffickers
Anette Brunovskis and May-Len Skilbrei
- 31 Transaction Costs: Prosecuting child trafficking for illegal adoption in Russia
Lauren A McCarthy
- 48 The Prosecution of State-Level Human Trafficking Cases in the United States
Amy Farrell, Monica DeLateur, Colleen Owens and Stephanie Fahy
- 71 Trafficking of Women for Sexual Exploitation in Europe: Prosecution, trials and their impact
Biljana Meshkovska, Nikola Mickovski, Arjan E R Bos and Melissa Siegel
- 91 The Prominent Role of National Judges in Interpreting the International Definition of Human Trafficking
Luuk B Esser and Corinne E Dettmeijer-Vermeulen

Debate: 'Prosecuting trafficking deflects attention from much more important responses and is anyway a waste of time and money'

- 107 Investments in Human Trafficking Prosecutions are Indispensable
Victor Boutros and John Cotton Richmond
- 110 Prioritising Prosecutions is the Wrong Approach
Kate D'Adamo
- 114 The Importance of Strategic, Victim-Centred Human Trafficking Prosecutions
Susan French and Cindy C Liou
- 118 Resisting the Carceral: The need to align anti-trafficking efforts with movements for criminal justice reform
Abigail Swenstein and Kate Mogulescu
- 123 Not all Prosecutions are Created Equal: Less counting prosecutions, more making prosecutions count
Marika McAdam
- 126 Villains and Victims, but No Workers: Why a prosecution-focussed approach to human trafficking fails trafficked persons
Inga Thiemann
- 130 Innocent Traffickers, Guilty Victims: The case for prosecuting so-called 'bottom girls' in the United States
Alexandra F Levy
- 134 Human Rights and Economic Opportunity Will End Trafficking
Juhu Thukral
- 138 Palermo's Promise: Victims' rights and human trafficking
Martina E Vandenberg

Editorial: The Problems and Prospects of Trafficking Prosecutions: Ending impunity and securing justice

Anne T Gallagher

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Having been guest editor of the very first issue of the *Anti-Trafficking Review*, it was with great pleasure that I accepted the invitation of the editorial board to oversee the production of its sixth issue. Back in 2012 I identified the emergence of the *Anti-Trafficking Review*, the first specialist journal on human trafficking, as a watershed moment, signalling the transformation of 'trafficking' from a niche (perhaps even a fringe) academic sub-discipline into a legitimate, substantial and discrete area of study.¹ The past four years since its launch have vindicated that assessment. New specialist journals on trafficking and its variants have been launched,² and the range and depth of research being undertaken in this field has significantly expanded. While law, sociology and human rights continue to be the dominant lenses through which trafficking is studied, analysed and explained, there is no denying the expanding and enriching influence of other disciplines: from geography to anthropology; from health sciences to migration studies. These changes in research and writing around trafficking have brought tangible benefits: helping improve our understanding of what is happening and why, as well as strengthening the evidence base on which credible, effective responses can be built.

¹ See the full editorial at: A T Gallagher, 'Editorial', *Anti-Trafficking Review*, issue 1, 2012, pp. 2–9, <http://www.antitraffickingreview.org/index.php/atrjournal/article/view/75/86>

² *Journal of Human Trafficking* (2015); *Slavery Today Journal* (2014); *Journal of Trafficking and Human Exploitation* (first issue expected to be published 2016).

In 2012 I sounded a warning about the quality of research around trafficking as gaps in knowledge and understanding were too often being denied or ignored; contrary views were being rejected without adequate consideration; and policy preferences were visibly distorting research processes and outcomes. While these problems have not disappeared, an overall increase in depth, volume and quality of research, especially around *how* trafficking happens, has helped to sideline work that may, in the past, have received more attention than it deserved. For example, the sector-focussed or otherwise exceptionally specific research undertaken by organisations such as Verité³ has been invaluable in setting new and higher standards for those involved in investigating the pathways to exploitation. Increasingly, such research is being strategically coordinated to impact the political economy around exploitation.⁴ Anecdotes dressed up as research are no longer sufficient in a world where transparent and increasingly sophisticated research methodologies are utilised to document the health effects of trafficking⁵ or the lived reality of reintegration.⁶

Unsurprisingly, bright spots in some areas are offset by little or no progress in others. The problem of accurately documenting trafficking/slavery/forced labour prevalence and assessing the quality of governmental responses seems to be as intractable as ever, despite the expenditure of massive effort and resources.⁷ Reliance on vast pools of compromised data to ‘prove’ links (for example, between legalisation of prostitution and trafficking)⁸ confirms that the truism of ‘garbage in, garbage out’ is as applicable to this field as it is to

³ See, for example: Verité, *Forced Labour in the Production of Electronic Goods in Malaysia*, 2014 and Verité, *Labour Brokerage and the Trafficking of Nepali Migrant Workers*, 2012.

⁴ See, for example: S Murray, ‘Casting a Tight Net’, *Stanford Social Innovation Review*, 2015, documenting the research-based campaign orchestrated by Humanity United to expose forced labour in Thailand’s seafood industry and the impact of that campaign on the Thai government, available at: http://ssir.org/articles/entry/casting_a_tight_net

⁵ See, for example: L Kiss et al, ‘Health of Men, Women, and Children in Post-trafficking Services in Cambodia, Thailand, and Vietnam: An observational cross-sectional study’, *Lancet Global Health*, vol. 3, 2015, p. 154.

⁶ See, for example: R Surtees, *After Trafficking: Experiences and Challenges in the (Re)integration of Trafficked Persons in the Greater Mekong Sub-region*, Nexus Institute/UNIAP, 2013.

⁷ See, for example: 8 *Forum on Crime and Society*, 2015 (Special issue on researching hidden populations: Approaches to and methodologies for generating data on trafficking in persons). Also see: A T Gallagher, ‘The global slavery index is based on flawed data—why does no one say so?’, *The Guardian*, 28 November 2014, retrieved 4 April 2016, <http://www.theguardian.com/global-development/poverty-matters/2014/nov/28/global-slavery-index-walk-free-human-trafficking-anne-gallagher> for my critique of the methodologies used by the authors of the *Global Slavery Index* to measure prevalence of ‘slavery’ and assess and rank the quality of government responses.

⁸ See, for example: S Y Cho, A Dreher and E Neumayer, ‘Does Legalized Prostitution Increase Human Trafficking?’, *World Development*, vol. 41, 2013, pp. 67–82 (which uncritically uses a 2006 United Nations report comprised entirely of self-reported data from states).

any other. As explained further below, the experience of pulling together the present issue has made clear that many of the problems that have plagued research on trafficking for years remain. While sobering, this should not be cause for despair. Rather, it affirms the value of a resource such as the *Anti-Trafficking Review*—a publication committed to the onerous but essential task of double-blind peer review—that encourages contributions from diverse voices; and that strives, at every turn, to bring rigour, criticism and a genuine spirit of enquiry into this important field of work.

This Issue

The decision of the *Anti-Trafficking Review* editorial board to devote an issue to consideration of prosecutions reflects an appreciation of the central importance of this aspect of the trafficking response, as well of its complexities and challenges.

International law requires states to prosecute trafficking in persons effectively and fairly. Along with prevention and protection, prosecution is widely seen as one of the main pillars of an effective national response to trafficking. For example, in the annual *Trafficking in Persons (TIP) Report*, the United States government considers: ‘whether the government vigorously investigates, prosecutes, and punishes trafficking’ to be a key indicator in assessing and ranking countries. That said, worldwide, the number of prosecutions for trafficking remains stubbornly low—especially when compared to the generally accepted size of the problem. Very few traffickers are ever brought to justice, and the criminal justice system rarely operates to benefit those who have been trafficked.

Government officials, criminal justice practitioners and others working in the anti-trafficking field assert that ending the current high levels of impunity enjoyed by traffickers, and securing justice for those who have been trafficked, requires vigorous prosecution of trafficking crimes. However, others have pointed out that pressures to prosecute, particularly when placed on underdeveloped criminal justice systems, have led to poor quality prosecutions that target lower level offenders; unfair and unsafe prosecutions that do not respect basic criminal justice standards; and disproportionate and politically motivated targeting of certain sectors, including the sex industry. Emphasis on prosecutions has also been identified as contributing to violations of the rights of persons who have been trafficked – for example, through laws and policies that compel trafficked persons’ cooperation with

criminal justice agencies or make assistance conditional on such cooperation. More generally, concerns have been expressed that the focus on prosecutions has been at the expense of attention to victims' rights including their right to protection, support and remedies.

The present issue of the *Anti-Trafficking Review* sought to take on the hard questions:

- Are prosecutions really an appropriate measure of an effective anti-trafficking response?
- What kinds of cases are being prosecuted?
- Why are there so few prosecutions, and even fewer convictions, for trafficking?
- How does the prioritisation of prosecutions (for example, over protection and prevention) frame our understanding of what trafficking actually is, why it happens, and what the solutions could or should be?
- What are the consequences of emphasising prosecutions in contexts of increased border security, criminalisation of migration, and imprisonment more generally?
- How can we ensure that the rights of trafficked persons are not further compromised by their participation in the prosecution of their exploiters?
- Can prosecutions *ever* deliver a genuinely positive result for trafficked persons?
- And perhaps most importantly, what do trafficked persons think (including in relation to their experiences in and outside the criminal justice system) about what works and what does not?

Our goal to address these questions proved to be an ambitious one—perhaps overly so. These are difficult topics, and satisfying, genuinely insightful answers are hard to come by. All articles selected for publication in the present volume address one or more of these questions, at least in part. But it is clear that for the present, many aspects of the prosecution part of the anti-trafficking equation remain unanswered.

A weak information base is certainly a part of the problem. The vast majority of countries have only been investigating and prosecuting trafficking offences for a short period of time. Cases are thin on the ground and, even when available,⁹ are

⁹ Obtaining judgments and other documents related to trafficking cases is difficult in most countries. UNODC has set up a case law database covering all forms of transnational organised crime including trafficking. As at March 2016, the database contained brief,

rarely subject to expert analysis. Lack of detailed information along with differences between countries in relation to how offences of trafficking have been crafted makes comparative analysis of prosecutions, which could provide useful insight into what works well and what does not, all but impossible. Scope is another problem. Most of the available primary information on prosecutions (whether generated through court decisions, other legal documentation or interviews with victims/practitioners/service providers) relates to trafficking of women for purposes of sexual exploitation. It should come as no surprise that the articles in this volume are heavily skewed towards this manifestation of trafficking. The limited perspective on prosecution of trafficking for purposes other than sexual exploitation distorts or, at best, provides only a partial response to the questions posed above. For example, the challenges facing victim-witnesses in prosecutions of trafficking for forced labour should not be readily extrapolated from what we know about the experiences of victim-witnesses in prosecutions of trafficking for sexual exploitation.

The shortage of available information is about much more than lack of cases and their narrow scope. While states are often eager to share what they are doing in relation to protection and prevention, they tend to be much more circumspect when it comes to criminal justice responses. The US *TIP Report's* focus on prosecution numbers has ensured that macro-level data (number of prosecutions/number of convictions) is regularly generated by states and made widely available at the international level, through both the annual *Trafficking in Persons Report* and the biennial United Nations *Global Report on Trafficking in Persons*. The United Nations Office on Drugs and Crime (UNODC) has worked with states and research institutions to produce a database of case summaries that provides a useful glimpse into the types of cases being prosecuted in some countries.¹⁰ However, more focussed and detailed information—on what actually happens, on the *process* and *quality* of prosecutions, for example—is much more difficult to come by. Some states do not publish or otherwise make available decisions or other case information. Others actively block researchers' access to victims, victim support workers and criminal justice practitioners, thereby ensuring that these valuable and unique experiences of the criminal justice process remain hidden. I have witnessed firsthand, on multiple occasions, research supported by bilateral donors and intergovernmental organisations being withheld or

uneven information on 1,296 cases. Most of these are related to trafficking for sexual exploitation. See: https://www.unodc.org/cld/search-sherloc-cld.jsp?f=en%23__el.caseLaw.crimeType_s%3aTrafficking%5c+in%5c+persons

¹⁰ Ibid.

pre-emptively modified because it reveals information that could reflect badly on the state concerned and thereby compromise relationships. There is little doubt in my mind that sensitivities in this regard have been aggravated by the exposure and criticism many states have endured through the US *TIP Report* process. That makes the US State Department's persistent failure to pay due attention to the quality of the prosecutions it encourages (an aspect of the prosecution debate discussed further at the end of this editorial) especially egregious.

An absence of practitioners' voices in research is particularly relevant to the present issue. Since its inception, the *Anti-Trafficking Review* has sought to encourage contributions from those who are on the frontline of anti-trafficking responses. Such contributions were judged to be of special importance for an issue focussed on prosecutions because of the capacity of criminal justice officials to shed unique light on many of the questions raised above. To that end, the editors took the unusual step of soliciting submissions from individuals with direct experience investigating and prosecuting trafficking cases and working with victim-witnesses. Unfortunately, while practitioners feature heavily in the extended 'debate' section, only a few submitted full-length articles. It is worth noting however, that practitioners formed the bulk of our peer reviewers for this issue and in this capacity played an invaluable—and irreplaceable—role in ensuring its quality. The *Anti-Trafficking Review's* peer reviewers are the backbone of the journal, and it is appropriate to record the debt of gratitude that is owed to all those who have given so generously of their time and expertise for this issue.

Thematic Articles Section

More submissions were received for this issue than for any other. Quality was a problem however, and less than half were judged of sufficient merit to be referred for peer review. Another feature of the articles submitted and the group finally selected for publication was the overwhelming focus on trafficking for purposes of sexual exploitation. This may well be an accurate reflection of prosecution practice: it is evident that trafficking for sexual exploitation receives the lion's share of criminal justice attention and resources in most, if not all countries. However, it may also indicate the continued existence of a long-standing bias in scholarship and research towards this particular form of trafficking.

The final group of five articles is a strong one, addressing a broad range of issues from diverse perspectives. In the first article, Brunovskis (a sociologist) and Skilbrei (a criminologist) tackle conditionality in assistance, or the policy or practice of making a victim's entitlement or access to protection and support contingent on his or her cooperation with criminal justice authorities. Their research considers the situation of women victims of sexual exploitation in Norway, a country that offers the possibility of permanent residence to victim-witnesses who cooperate with authorities. In seeking to establish whose interests are being served by this conditionality, the authors also engage with the broader question of what may have been lost through the women's movement's embrace of criminal justice responses to sexual and sexualised violence.

The risks associated with an expansionist conception of what constitutes trafficking have been repeatedly noted. In her article, McCarthy (a lawyer and political scientist) addresses the prosecution of illegal (often non-exploitative) adoptions in Russia as trafficking. The importance of McCarthy's contribution lies not just in her data-rich exposure of these prosecutions, but also in her insights into how such prosecutions evolved and how they became such an important part of Russia's anti-trafficking response. Put simply, this phenomenon did not emerge in a vacuum; rather, it reflects cultural narratives surrounding adoption in Russia and has been cemented over time by legislation that prioritises the transactional element over any considerations of exploitative intent when it comes to identifying a situation as 'trafficking'.

As this editorial has already noted, there is a dearth of research into the *how* of trafficking prosecutions. In their article, Farrell, DeLateur, Owens and Fahy shed light on one important and under-researched aspect: the factors that come into play when prosecutors use their discretion to decide whether or not to pursue a case that has been investigated as human trafficking. Their research examines only a small sample of cases in US state courts, however. The findings point to concerns that have been regularly raised in the US and elsewhere: prosecutors are often unaware of the legal framework around trafficking or reluctant to use it; trafficking laws are used primarily—and sometimes even exclusively—to pursue trafficking for sexual exploitation and not other forms of trafficking; and even where there are strong indicators of trafficking, prosecutors may prefer to charge other, often lesser, offences that are more likely to result in conviction. The findings on victim-witness involvement were unclear and somewhat troubling in that securing or coercing victim involvement (for example, through threat of arrest) is a primary driver of prosecution. But charges may not be pursued if the victim's testimony is not supported by corroborative evidence. The authors highlight the need for

more and deeper research into understanding the role played by victims in determining which trafficking cases end up in court.

A very different set of issues arises when a trafficking investigation does proceed to trial and judgment. In their article, Meshkovska, Mickovski, Bos and Siegel examine the impact of trafficking trials on victims. Their findings are based on interviews with victims of trafficking for sexual exploitation and service providers in five European countries. Once again, while the sample is very small and narrowly focussed, the findings are helpful in fleshing out long-established concerns about victim experiences of the criminal justice process. For example, while testifying is inevitably traumatic for the victim of any serious criminal offence, that trauma is often aggravated in trafficking trials because of lack of procedural safeguards for privacy and security; inadequately trained officials; and failure to provide victims with information. While it is to be expected that any criminal trial for a serious offence will be complex and drawn out, inefficiencies in the process cause additional, unnecessary delays. These delays can place an unendurable burden on victim-witnesses in trafficking cases, particularly if the state concerned has not put in place measures (such as residency options and access to compensation) that can allow them to plan for the future. As the authors conclude, criminal proceedings have a direct influence on victims, including on their recovery and reintegration. The potential for such proceedings to both harm and empower victims must be recognised and managed.

The question of whether definitions matter has been hotly debated within the international anti-trafficking community, not least in the *Anti-Trafficking Review*.¹¹ Within the context of prosecutions however, there is no room for discussion. The definition of the offence and the elements that make up that offence must be as clear as possible, not least to afford the accused his or her basic right to a fair trial. Unfortunately many countries are struggling. National laws inevitably reflect a version of the complex, somewhat ambiguous international legal definition of trafficking agreed in the 2000 UN Trafficking Protocol. As the final article shows, this provides considerable scope for judicial interpretation of the definition and thereby, of what conduct constitutes ‘trafficking’ under the national legal framework. In their examination of Dutch judicial practice, Esser and Dettmeijer-Vermeulen point to gatekeeper concepts such as ‘abuse of a position of vulnerability’ and

¹¹ See the ‘debate’ section in *Anti-Trafficking Review*, issue 5, and N Piper, M Segrave and R Napier-Moore, ‘Editorial: What’s in a Name? Distinguishing forced labour, trafficking and slavery’, *Anti-Trafficking Review*, issue 5, 2015, pp. 1–9, retrieved 4 April 2016, <http://www.antitraffickingreview.org/index.php/atrjournal/article/view/133/133>

‘exploitation’ as being especially significant in this regard, underpinning an expanded conception of trafficking that some could argue to be contrary to the intentions of the Protocol. The article raises important questions about whether such differences matter and, if so, why. Should we be encouraging states towards a more consistent understanding of the parameters of the criminal offence of trafficking or should we view divergent interpretations as a positive reflection of the successful integration of ‘trafficking’ into national legal frameworks?

The Debate Section

Contributors to the ‘debate’ section of the *Anti-Trafficking Review* were invited to discuss this deliberately provocative proposition: *Prosecuting trafficking deflects attention from much more important responses and is anyway a waste of time and money*. Within the anti-trafficking community, there has been a longstanding and well-excavated schism between those who consider a strong criminal justice response to be central to any effective national response and those who view such a singular approach as distracting, damaging and/or counter-productive. By raising this debate, the editors sought to establish whether that schism still exists and, if so, the key points of both positions.

As with the general articles section, more submissions were received for this debate than any previous one and, once again, the focus was very strongly on trafficking for purposes of sexual exploitation. Since submissions to the debate section are not peer reviewed, it is up to the editors to make both the initial cut and the final selection. In addition to assessing relevance and quality, the editors sought to ensure that as broad a range of views and perspectives as possible were reflected in the final group of debate pieces chosen for publication. However, that range was not as great as expected. While contributors differed significantly in their assessment of the place that prosecutions should occupy within the national trafficking response, most were unprepared to reject outright the criminal justice aspect of that response. That said, even amongst firm advocates of the view that prosecutions are essential to ending impunity and securing justice for victims, national criminal justice responses to trafficking are widely recognised to be highly problematic. Contributors emphasised that a more effective prosecutorial response must be one that prioritises and facilitates restitution for victims (Vandenberg); that is adequately resourced (Richmond and Boutros); that is victim-centred and appropriately targeted (French and Liou, Levy); and that makes use of the full range of available laws (McAdam).

Several contributors (D’Adamo, Thukral, Thiemann, Swenstein and Mogulescu), while acknowledging a role for prosecutions, did indeed mount a spirited defence of the proposition, arguing that an overreliance on criminal justice responses negatively impacts victims and broader anti-trafficking efforts. They further argue that this approach is compromised because it simplifies the ‘problem’ of trafficking in a way that obstructs an honest interrogation of the complex social, cultural and political factors that create and sustain people’s vulnerability to exploitation.

Ultimately, most contributions to the debate coalesced around two central ideas. First: failure to prosecute trafficking effectively makes a mockery of criminalisation and ensures the cycle of exploitation will continue unchecked; and second: prosecutions that ignore the rights and needs of victims are hollow victories that will never deliver true justice.

A Final Word on Inappropriate and Wrongful Prosecutions

While McAdam noted the importance of measuring the quality of prosecutions, rather than quantity, none of the contributions directly addressed the problem of unfair or unjust prosecutions—meaning cases that are investigated, prosecuted and adjudicated on weak or non-existent evidence and/or without regard to the accused person’s right to a fair trial. The absence of discussion on this aspect is worrying, if unsurprising. Suspects in trafficking cases are much less interesting to researchers and advocates than victims and criminal justice actors. The geographical reach of current research is also highly relevant. Most research on trafficking prosecutions focusses on the United States, Western Europe and a handful of other similarly situated countries, such as Australia, where protections for defendants are relatively strong. We know very little about the thousands of prosecutions for trafficking that have been reported in other parts of the world, including in countries with weak or dysfunctional criminal justice systems. My own firsthand experience in Southeast Asia suggests that the drive for prosecutions (largely initiated and perpetuated by the US government through the *TIP Report* process) is contributing to miscarriages of justice on a significant scale as countries scramble to prove their commitment to anti-trafficking efforts in a way that will appeal to their assessors. Cases that are not trafficking (such as pimping and marriage brokering) are being prosecuted as such and convictions are leading to penalties that are grossly disproportionate to the seriousness of the underlying conduct. Accused

persons are too often being denied the right to challenge their accusers, to benefit from a presumption of innocence and to secure assistance in their defence. Lengthy delays, lack of judicial independence and inappropriate sentencing—all operate to compound these injustices. For even the most committed advocates of an aggressive criminal justice response to trafficking, this situation should give cause for great concern. Any policy or programme that emphasises or rewards *more* prosecutions while failing to actively promote, support and monitor *better* prosecutions that respect the rights of all persons—victims and accused alike—is ethically compromised and strategically flawed.

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Thematic Articles

Two Birds with One Stone? Implications of conditional assistance in victim protection and prosecution of traffickers

Anette Brunovskis and May-Len Skilbrei

Abstract

Protection of victims and prosecution of traffickers are established as core principles in international and national anti-trafficking policies. In this article, we discuss the dilemmas of linking protection of victims (a term that includes social protection) to their cooperation with authorities, using Norway as a case. Our analysis of the Norwegian case is based on interviews with victims of trafficking, social workers, police and prosecutors, and examination of court decisions on cases of trafficking. The linking of protection and prosecution is anchored in international conventions and directives. While this is often framed as a mutual advantage for both protection and prosecution, in reality both goals may suffer. We discuss how the goal of prosecution affects assistance available to different groups of victims. It creates unequal access to assistance and different preconditions for well-being and predictability, depending on how useful their information about traffickers is perceived to be, and police capacity to investigate. We then move on to discuss how the incentive of protection for cooperation is interpreted and dealt with in the justice system. Victims who receive assistance and have a chance of getting permanent residence permits in exchange for their testimonies are considered to be less reliable and credible witnesses. This also brings into question how victims of trafficking are understood and constituted as witnesses. We discuss these issues in light of a broader literature on gender, law and victimhood.

Keywords: human trafficking, prosecution, Norway, assistance, conditionality

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Introduction

With growing attention to human trafficking over the past decades, there was also a realisation that protection of victims was difficult within existing policy frameworks. Victims of trafficking sometimes lacked legal residence, or violated laws while trafficked, and were sometimes deported/returned or prosecuted themselves, with or without being identified as victims. Victims' lack of rights was also a barrier for prosecuting traffickers, as investigations were hampered by victims disappearing.

The introduction in European policy of the 'reflection period' (that is, temporary residence status for possible victims of trafficking) aimed to secure both protection and prosecution, and explicitly linked the two. A 2004 European Union (EU) Directive¹ specified that residence permits were for victims of trafficking who cooperate with the authorities. The Council of Europe (CoE) human trafficking convention obliges States Parties to provide a reflection period of at least 30 days, with one aim being that they 'take an informed decision on cooperating with the competent authorities'.²

In this article, we discuss how the two goals of protection and prosecution are balanced in current anti-trafficking efforts in Norway, and point to dilemmas that the linking of these aspects creates. We use the term 'protection' broadly to include victims' access to social, legal and medical assistance, in contrast to a more narrow understanding of protection from retribution or intimidation from traffickers. This is based in an understanding that protection from harm also includes addressing physical and mental health, as well as socio-economic vulnerabilities likely to leave a victim at risk of harm in the form of continued exploitation and/or re-trafficking. We discuss specific challenges for victims and for the criminal justice system, which we believe are representative of the situation in several countries with policy models that in different ways link protection to cooperation with authorities. Such is the case for many States Parties to the CoE human trafficking convention, depending on national policy implementation.³ We explore two main issues: 1) How does the focus on

¹ European Union, *EU Council Directive 2004/81/EC of 29 April 2004: On the residence permit issued to third-country nationals who are victims of trafficking in human beings or who have been the subject of an action to facilitate illegal immigration, who cooperate with the competent authorities*, 2005.

² Council of Europe, *Council of Europe Convention on Action against Trafficking in Human Beings and its Explanatory Report*, Council of Europe Treaty Series, No. 197, 16.V.2005.

³ See for instance A Brunovskis, *Balancing Protection and Prosecution in Anti-Trafficking Policies: A comparative analysis of reflection periods and related temporary residence permits for victims of Trafficking in the Nordic countries, Belgium and Italy*, Nordic Council of Ministers, Copenhagen, 2012.

prosecution influence the protection of victims? 2) How is the provision of residence permits/protection following cooperation understood in the prosecution system? We discuss these issues in light of a broader literature on gender, law and victimhood. Our analysis focusses on female adult victims of trafficking for sexual exploitation. While there is an increased focus on trafficking for other purposes, historically the Norwegian anti-trafficking response has been directed at this group, and policies were initially developed primarily in response to concerns over changes in the prostitution arena. Further, most prosecutions in Norway have also involved this particular category of victims.

We have in the last decade undertaken a series of studies on anti-trafficking policies with regard to both legal interventions⁴ and assistance.⁵ This article particularly builds on three research projects: an evaluation of the reflection period in Norway,⁶ a comparative study of the reflection period in seven European countries⁷ and the ongoing project Health Services and Needs in Prostitution. Through these projects we have explored the relationship between prosecution and protection from different vantage points. Findings from these previous studies are integrated in our analysis in this article, supplemented by qualitative interviews with victims of trafficking (n=12), social workers/assistance providers (n=32) and representatives from the police and prosecution (n=10), as well as analysis of written court decisions and policy documents.

⁴ See for instance M L Skilbrei, 'Taking Trafficking to Court', *Women & Criminal Justice*, vol. 20, 2010, pp. 40–56; M L Skilbrei and M Tveit, 'Defining Trafficking through Empirical Work: Blurred boundaries and their consequence', *Gender, Technology and Development*, 12(1), 2008, pp. 9–30.

⁵ See for instance A Brunovskis and R Surtees, *Leaving the Past Behind: When victims of trafficking decline assistance*, Fafo, Oslo, 2007; A Brunovskis and R Surtees, 'Coming Home: Challenges in family reintegration for trafficked women', *Qualitative Social Work*, doi: 1473325011435257 ; A Brunovskis and R Surtees, *A Fuller Picture: Addressing trafficking related assistance needs and socio-economic vulnerabilities*, Fafo, Oslo, 2012.

⁶ A Brunovskis, M Tveit and M L Skilbrei, *Pusterom eller Ny Start? Evaluering av refleksjonsperioden for ofre for menneskehandel*. Fafo Report 2010:45, Fafo, Oslo, 2010.

⁷ Brunovskis, 2012.

Human Trafficking, Protection and Prosecution in the Norwegian Context

The Norwegian legal framework that regulates the relationship between protection and prosecution was developed in accordance with the aforementioned EU Directive and CoE Convention.⁸ First introduced as a 45-day delayed return in 2004, the reflection period was in 2006 expanded to a six-month temporary work and residence permit, with a low threshold. Should the police initiate an investigation, the residence permit can be renewed in one-year increments. In 2008 a third step was added, the so-called ‘witness instruction’: victims who testify as an injured party in a trafficking case are to be granted permanent residence in Norway.⁹

The intention behind the reflection period is specified in a Norwegian Directorate for Immigration Circular¹⁰ and government action plans against trafficking.¹¹ Victims should be given the opportunity to break with traffickers, and further, given time to take an informed decision about cooperating with the police. The main goals are to provide victims with health services and social assistance, and to facilitate prosecution of traffickers.

Data on identified possible cases are published annually by the Norwegian Police Directorate, based on reporting from governmental and non-governmental organisations. Since 2007, between 200 and 350 persons each year have been classified as possible victims, and all cases involved international migration. Since 2008, between 45 and 50 persons each year have applied for a reflection period. Around one-third of these applications have been rejected.¹²

⁸ While not an EU member, Norway is obliged to implement EU Directives by its membership in the European Economic Area (EEA). Norway is a member state of the Council of Europe.

⁹ As of January 2010 the reflection period and the witness instruction are regulated by the Immigration Regulation (“Utlendingsforskriften”) § 8-3 and § 8-4: and Circular RS 2013-014 (“Oppholdstillatelse for utlendingersomantas å være utsatt for menneskehandel (refleksjonsperiode mv).

¹⁰ Utlendingsdirektoratet, *Oppholdstillatelse for utlendinger som antas å være utsatt for menneskehandel (refleksjonsperiode mv)*, RS-2013-014, 2013.

¹¹ Norwegian Ministry of Justice and the Police (2006), *Stopp menneskehandelen. Regjeringens handlingsplan mot menneskehandel [2006-2009]*, Norwegian Ministry of Justice and the Police (2010), *Sammen mot menneskehandel. Regjeringens handlingsplan mot menneskehandel (2011-2014)*.

¹² Police Directorate, *Rapport fra koordineringsenheten for ofre for menneskehandel–Årene 2007-2008*, 2009; Police Directorate, *Rapport fra koordineringsenheten for ofre for menneskehandel–2009*, 2010; Police Directorate, *Rapport fra koordineringsenheten for ofre for menneskehandel–2010*, 2011; Police Directorate (2012), *Rapport fra koordineringsenheten for ofre for menneskehandel–2011*, 2012; Police Directorate, *Rapport fra koordineringsenheten for ofre for menneskehandel–2012*, 2013; Police Directorate, *Rapport fra koordineringsenheten for ofre for menneskehandel–2013*, 2014.

Around 30 cases of trafficking have been taken to court in Norway since the introduction of the Trafficking Act in 2003, most of which involved sexual exploitation and female victims.

Protection and Prosecution in Human Trafficking Literature

A central paradigm in international anti-trafficking policy is the so-called ‘three P’s’,¹³ of prevention, protection and prosecution¹⁴—generally reflecting the various categories of commitment/obligation assumed by States under international and national law. While the relationship between the P’s is often not problematized, prosecution has been given a prominent formal role. For instance, in the Trafficking Protocol—the only global instrument in anti-trafficking policy¹⁵—provisions relating to prosecution are mandatory for States Parties, while they are only encouraged to fulfil provisions on protection.¹⁶

Prosecution of traffickers is often framed as a primary measure of success in anti-trafficking policy. While prosecution data lend themselves very poorly to comparisons or mapping of difference and change,¹⁷ referring to numbers of prosecutions as a relative measure of success is a fairly common international exercise (e.g. the US annual Trafficking in Persons reports,¹⁸ or the Global Report on Trafficking in Persons¹⁹). Also in the Norwegian context there has

¹³ With a fourth ‘P’, ‘partnership’, suggested in 2009 by US Secretary of State Hillary Clinton (United States Department of State, *The ‘3P’ Paradigm: Prevention, Protection, and Prosecution*. Democracy and Global Affairs, June 2014).

¹⁴ See: J Goodey, ‘Sex Trafficking in Women from Central and East European Countries: Promoting a “victim-centred” and “woman-centred” approach to criminal justice intervention’, *Feminist Review*, vol. 76, 2004, pp. 26–45; V Samarasinghe, ‘Confronting Globalization in Anti-Trafficking Strategies in Asia’, *Bronn Journal of World Affairs*, vol. 10, 2003, pp. 91–104.

¹⁵ United Nations, *Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, Supplementing the United Nations Convention against Transnational Organized Crime*, 2000.

¹⁶ A T Gallagher, ‘Human Rights and the New UN Protocols on Trafficking and Migrant Smuggling: A preliminary analysis’, *Human Rights Quarterly*, vol. 23, 2001, pp. 975–1004 ; A T Gallagher, ‘Recent Legal Developments in the Field of Human Trafficking: A critical review of the 2005 European Convention and Related Instruments’, *European Journal of Migration and Law*, vol. 8, 2006, pp. 163–189; D F Haynes, ‘Used, Abused, Arrested and Deported: Extending immigration benefits to protect the victims of trafficking and to secure the prosecution of traffickers’, *Human Rights Quarterly*, vol. 26, 2004, pp. 221–272).

¹⁷ Brunovskis, 2012.

¹⁸ US State Department, ‘Tier Placements’, *TIP Report*, US State Department, retrieved 24 June 2015, <http://www.state.gov/j/tip/rls/tiprpt/>

¹⁹ United Nations Office on Drugs and Crime (UNODC), *Global Report on Trafficking in Human Beings*, UNODC, Vienna, 2009.

been considerable attention to differences between cities in terms of numbers of identified cases and prosecutions, something which is debated in terms of differences in priorities and understanding of the gravity of trafficking.²⁰

Several authors are critical of the overarching dominance of the criminal justice approach in international anti-trafficking policy and problematize addressing human trafficking as primarily an issue of organised crime or as an issue for migration control.²¹ A substantial body of literature further challenges simplistic notions of the circumstances, mind-sets and needs of those defined as victims. This literature points to heterogeneous experiences falling within the definition of human trafficking, not all of which can easily be addressed within a criminal justice framework.²² This points to the potential for systematically unequal access to protection, if protection is administered through a filter of stereotypes and prosecutable cases.

'The Ideal Victim' and Credibility

Much of the literature on the relationship between protection and prosecution in anti-trafficking policy takes as a starting point a (human) rights based perspective for a critique of the linking of the two elements. Perhaps less considered are the particularities involved in the prosecution and adjudication of trafficking cases.²³ One important issue is the consequences of awarding advantages to trafficking victims who agree to cooperate as witnesses, in terms of how this is understood and dealt with in the criminal justice system. It has been pointed out that offering residency conditioned upon testifying can backfire in court and provide opportunity for the defence to draw into doubt

²⁰ M L Skilbrei, 2010.

²¹ See for instance A D Jordan, 'Human Rights or Wrongs? The struggle for a rights-based response to trafficking in human beings', *Gender & Development*, vol. 10, 2002, pp. 28–37; C Aradau, 'The Perverse Politics of Four-letter Words: Risk and pity in the securitisation of human trafficking', *Millennium-Journal of International Studies*, vol. 33, 2004, pp. 251–277; J Berman and C Friesendorf, 'EU Foreign Policy and the Fight Against Human Trafficking: Coercive governance as crime control', *European Foreign Affairs Review*, vol. 13, 2008 pp. 189–209; C Nieuwenhuys and A Pecoud, 'Human Trafficking, Information Campaigns, and Strategies of Migration Control', *American Behavioral Scientist*, vol. 50, 2007, pp. 1674–1695.

²² See for instance L M Agustín, *Sex at the Margins: Migration, labour markets and the rescue Industry*, Zed Books: London, 2007; C Hoyle, M Bosworth and M Dempsey, 'Labelling the Victims of Sex Trafficking: Exploring the borderland between rhetoric and reality', *Social & Legal Studies*, vol. 20, 2011, pp. 313–329; K Kempadoo 'The War on Human Trafficking in the Caribbean', *Race & Class*, vol. 49, 2007, pp. 79–85.

²³ A Constantinou, 'Human Trafficking on Trial: Dissecting the adjudication of sex trafficking cases in Cyprus', *Feminist Legal Studies*, vol. 21, 2013, pp. 163–183.

the veracity of the testimony,²⁴ or indeed, even induce exaggeration of information in order to obtain a residence permit.²⁵ Problems with linking testimonies with high-valued rewards in relation to credibility and due process are not exclusive to the field of trafficking. Gribaldo²⁶ demonstrates how in domestic violence trials, the female victim who does not make demands is often construed as more credible. Having something to gain for testifying easily weakens the credibility of the victim and threatens corresponding rights. Gender constructions play a part in this. Women who make demands are particularly vulnerable to having their credibility questioned as they are seen to be possibly manipulative. They are expected to live up to an idealised form of victimhood.²⁷

There is a broad literature on how victims/witnesses in cases of sexual or sexualised violence face challenges in legal proceedings²⁸ and how it is necessary for victims to live up to the standard of an ‘ideal’,²⁹ ‘iconic’³⁰ or ‘culturally approved’³¹ victimhood to appear credible in court. Christie describes how in order to be a credible victim, she needs to live up to respectability standards and be seen as someone who has not contributed anything towards her own victimisation.³² Several researchers have analysed how these perceptions impact on the evaluation of anti-trafficking policies,³³ victims’ access to services³⁴ and

²⁴ Haynes, 2004.

²⁵ R Rafaelli, ‘The European Approach to the Protection of Trafficking Victims: The Council of Europe Convention, the EU Directive, and the Italian experience’, *German Law Journal*, vol. 10, 2009, pp. 205–222.

²⁶ A Gribaldo, ‘The Paradoxical Victim: Intimate violence narratives on trial in Italy’, *American Ethnologist*, vol. 41, 2014, pp. 743–756.

²⁷ S Lamb, ‘Constructing the Victim: Popular images and lasting labels’ in S Lamb (ed.), *New Versions of Victims. Feminists struggle with the concept*, New York University Press, New York, 1999, pp. 108–138; Gribaldo, 2014.

²⁸ C Smart, *Law, Crime and Sexuality: Essays in feminism*, SAGE, London, 1995; Lamb 1999; J Temkin and B Krahe, *Sexual Assault and the Justice Gap: A question of attitude*, Hart Publishing: Oxford, 2008.

²⁹ N Christie, ‘The Ideal Victim’ in E A Fattah (ed.), *From Crime Policy to Victim Policy*, MacMillan, Basingstoke, 1986, pp. 17–30.

³⁰ J Srikantiah, ‘Perfect Victims and Real Survivors: The iconic victim in domestic human trafficking law’, *Boston University Law Review*, vol. 87, 2007, pp. 157–211.

³¹ Lamb, 1999, p. 117.

³² Christie, 1986.

³³ M Wilson and E O’Brien, ‘Constructing the Ideal Victim in the United States of America’s Annual Trafficking in Persons Report’, *Crime, Law & Social Change*, online first 14 January 2016 DOI 10.1007/s10611-015-9600-8.

³⁴ A Brunovskis and R Surtees, ‘Agency or Illness—The conceptualization of trafficking victims’ choices and behaviors in the assistance system’, *Gender, Technology and Development*, 12(1), 2008, pp. 53–76.

also on the identities of the victims themselves.³⁵ What is particularly relevant here is whether being seen as a credible victim is contingent on cooperation with police and prosecution. Srikantiah points out in her research on victim identification and credibility in the US: ‘Just as blamelessness prior to rescue required demonstrated passivity, blamelessness post-rescue requires active cooperation with law enforcement.’³⁶ The question is also whether such cooperation will contribute towards credibility in the same way for all victims, or whether this is dependent on how she lives up to other aspects of the ‘ideal’ victim.

With the above discussions in mind, we seek to explore how the relationship between protection and prosecution plays out in the Norwegian context, both in terms of the situation for victims and with respect to the criminal justice system.

How Prosecution Affects Protection

A common notion is that providing protection to victims also ‘produces’ witnesses for prosecuting traffickers.³⁷ This underestimates that not all victims will be useful witnesses in terms of having valuable information, or indeed well served by testifying.³⁸ While policy documents also frame the ‘causal relationship’ as protection leading to cooperation,³⁹ in practice it may equally be understood as cooperation leading to protection. This distinction, in terms of its impact on victims’ decision-making and well-being, is an important one.

³⁵ C Jacobsen and M L Skilbrei, ‘Reproachable Victims? Representations and self-representations of Russian women in transnational prostitution’, *Ethnos*, vol.75, no. 2, 2010, pp. 190–212.

³⁶ Srikantiah, 2007, p. 199.

³⁷ See for instance Haynes, 2004; Rafaelli, 2009; M Ventrella, ‘Protecting Victims of Trafficking in Human Beings in the UK: The Italian Rimini method that could influence the British approach’, *Journal of Migration and Refugee Issues*, vol. 3, 2007, pp. 64–86.

³⁸ Goodey, 2004.

³⁹ For instance, the 2011 EU Directive on human trafficking on the subject of trafficking victims’ protection from prosecution lists the aims as ‘...to safeguard the human rights of victims, to avoid further victimization and to encourage them to act as witnesses in criminal proceedings against the perpetrators’. (European Union, *EU Council Directive 2011/36/EU of 5 April 2011: On preventing and combating trafficking in human beings and protecting its victims, and replacing Council Framework Decision 2002/629/JHA*, 2011, explanatory paragraph 14.)

In this section, we explore three main issues. First, the pressures created by the relative value of different forms of protection and the importance of the migration context for victims. Second, the unequal access to protection, depending on whether victims have useful information to share with authorities. Finally, we question whether decisions about cooperation are generally informed (as set forth, for instance, in the CoE Convention) or in the best interest of victims, given the highly unpredictable outcomes of criminal justice processes, which have great bearing on the actual outcomes for victims.

While the widespread assumption that recovery and protection will lead more victims to testify may seem reasonable, it is nevertheless largely undocumented. A common understanding is that a central part of deciding on whether to cooperate is about individual recovery, including trust, or a generic ‘confidence in the state’.⁴⁰

While we believe that both trust and recovery can be important, we nevertheless contend that this does not sufficiently address the migration context for victims of trafficking and its importance in many victims’ decisions about cooperation. For several victims we have interviewed, deciding to cooperate was not primarily about their recovery or gaining trust in the state, but what cooperation would mean for their future, not least in terms of where they would be able to live. Obtaining permanent residence in Norway can substantially change how the future is imagined, not only for the individual victim, but for their ability to help family with remittances, or creating a better life for children. Speaking of her thoughts on her future, one woman, who had been granted permanent residence said:

I’m thinking that I’m going to stay in Norway, go to school, learn Norwegian, get a job, and help my family [back home]. I know that my life is going to be OK because I’m being helped.

Others spoke of affordable access to health care and education for children as a strong motivator for trying to obtain a residence permit. This is not to suggest that protection or assistance is only available in Norway, or in the so-called destination countries. Several of the countries from which victims in Norway come, offer assistance. Nevertheless, the quality and availability of

⁴⁰ See for instance: UNODC, *Toolkit to Combat Trafficking in Persons*, UNODC, Vienna, 2008, p. 220.

these services vary to a great extent, and may not always be, or be perceived as, a good or even possible alternative.⁴¹ For several reasons, most of our respondents did not consider going ‘home’ a real alternative. Said one woman:

My lawyer told me that IOM helps people return. I asked what kind of help they provide, can I stay with the IOM in Nigeria? No, after a month with assistance at the premises you’ll go on by yourself. I cried when I heard about that alternative. It would be hopeless to go back to Nigeria. I don’t know where the woman who brought me to Europe is. They can kill me.

While several of the women we interviewed spoke of fear of traffickers, there were also other reasons. For instance, one had had a child out of wedlock and said that this effectively would exclude her from her family. In other cases, women spoke of deep poverty and lack of prospects for the future. For our respondents, even the possibility of permanent residence contributed strongly to motivating cooperation.

One consequence of linking prosecution and residence permits, as is done in Norway, is that access to this highly valued form of protection is unequally distributed. Victims’ ability to stay in Norway and receive assistance is linked not only to their willingness to cooperate, but also the usefulness of the information they share. And the actual outcome depends on investigations and police capacity, not least for cross border investigations. Whether charges are actually filed may also be influenced by previous court decisions and whether prosecutors assess that there is a chance of a successful trial. One respondent very clearly problematized the unequal ability to give useful information:

Sometimes when the police want the story and you tell them what you know, they say you’re lying because your information isn’t right, it doesn’t check out. If you live with the pimp, then maybe you can give useful information, but otherwise it’s almost impossible. None of the girls in the street have correct information about the pimps anyway. There’s so much bad stuff on the street, you need to be someone else, you need to use a fake name. If someone says their name is Joy, it never really is.

⁴¹ M L Skilbrei and M Tveit, ‘Mission Impossible? Voluntary and dignified repatriation of Nigerian victims of trafficking’ in T D Truong and D Gasper (eds.), *Transnational Migration and Human Security*, Springer, 2011, pp. 135–145.

When highly sought after protection becomes dependent on usefulness of the information that victims are willing or able to share, one consequence is the instrumentalisation of victims. What assistance is offered to them and what their further trajectories become, depends on their function in and value to a criminal justice process, not their individual needs. Somewhat bizarrely, this also creates an inequality in access to protection that particularly disfavours victims who have been very isolated, had very little control over their situation and/or very limited access to information about their traffickers.⁴²

We argue above that the current pairing of protection and prosecution serves to create a considerable pressure on victims to cooperate with authorities. By implication, it needs to be discussed whether victims may be pressured into taking decisions about cooperating that they otherwise would not have taken, due to the high stakes and potential high returns. In lay terms this can be framed as whether they are given an offer they cannot refuse. In the field of ethics this is generally termed ‘undue inducement’.⁴³ Central to this discussion is whether it is in the best interest of victims to cooperate, or whether they are induced to cooperate even if it is against their best interest, because of potential high gains. This must also be seen in relation to the often considerable socio-economic vulnerability of trafficked persons.

Our respondents described different experiences with (and assessments of) their cooperation with authorities in criminal proceedings against their traffickers. Some were satisfied both with the process and the outcome, some had very strong regrets that they had cooperated. In yet other cases, the picture was more complicated and our respondents spoke of cooperation having both high costs and high benefits.

In one successfully prosecuted case, the woman voiced a strong sense of relief that her traffickers were punished:

⁴² Brunovskis, 2012.

⁴³ See: Brunovskis, 2012, pp. 56–58 for a discussion of due/undue inducement and victim protection. For discussions of undue inducement and coercive offers in research ethics literature, see for instance E J Emanuel, ‘Ending Concerns about Undue Inducement’, *The Journal of Law, Medicine & Ethics*, 32(1), 2004, pp. 100–105; R Macklin, ‘‘Due’ and ‘Undue’ Inducements: On passing money to research subjects’, *IRB: Ethics & Human Research*, 3(5), 1981, pp. 1–6; J McGregor, ‘‘Undue Inducement’’ as Coercive Offers’, *The American Journal of Bioethics*, 5(5), 2005, pp. 24–25.

If I had to choose again, I would have done the same thing. What else could I have done? I had no choice. Should I have gone back to the street? I couldn't go [home] and I was terrorised by the pimps. The reflection period was a great help, I got the chance to start anew. Not having to be in the street, get a new start, a new life. It was very good.

Very negative consequences ensued when charges were dropped or investigations did not lead anywhere. One woman expressed strong regret that she had cooperated with authorities and given them the name and address of her trafficker:

I've been in this process for two or three years now, I feel like my life is just passing me by, and I don't know where I belong or how this is going to end. After the reflection period my situation is even worse than before. If I'd stayed with the pimp I might have been free by now, but it's like I've wasted several years for nothing. I can't go home, he will find me.

For others, there was considerable ambivalence and both high costs and benefits. In another successfully prosecuted case, a feeling of fear and guilt was overwhelming. Two of the woman's family members had died at times that coincided with important developments in the investigation of her case. She tearfully explained that they had died as a result of voodoo⁴⁴ because she had cooperated with authorities, and blamed herself for their deaths. At the same time, she expressed that she had no alternative and that the assistance she received had finally given her some hope for her future.

These different outcomes and experiences challenge the assumption that cooperating or testifying is generally empowering, or always in the victims' best interest. Another issue that bears discussion is whether and to what extent decisions about cooperating can really be 'informed' (as set forth, for instance, in the CoE Convention). That it is in the victim's best interest to cooperate will rarely be clear at the time that the decision needs to be taken, but

⁴⁴ The role of 'voodoo' pacts in the trafficking of Nigerian women in particular has received quite a lot of attention. In our previous research we found that voodoo takes on different meanings for different women—in some cases, it appears to be more of a ritual connected to agreements in general and is not necessarily given much weight or seen as a real threat. In other cases, however, such as this, voodoo is experienced as extremely powerful and terrifying (Skilbrei and Tveit 2008).

depends on an unpredictable future outcome in the criminal justice system. Several women we interviewed described it as a disempowering process with loss of control and waiting for information. It is our impression that police, lawyers and social workers in many cases tried to offset this uncertainty to the best of their abilities, though in periods there might not be any new information to share.

How Protection Affects Prosecution

As demonstrated above, the linking of protection and prosecution affects the access victims have to protection and is also something that stands in the way of their ability to protect themselves from possible harms of testifying. In this section, we focus on two sets of issues to understand how current policy affects the ability of police and prosecution to successfully prosecute trafficking. The first issue has to do with the ability to build a trafficking case in the first place, and the other with the likelihood of success once a case reaches court.

During research into the reflection period, we found among police officers and representatives of the prosecution different opinions about how protection and prosecution should complement each other. The view that protection leads to prosecution is, as mentioned above, central in the CoE Convention and in Norwegian policy documents, but it is less clear how this actually plays out. While police officers we interviewed generally were of the opinion that they *should* be linked, only representatives from one of the larger police districts explicitly talked about how this link directly contributed to their ability to prosecute trafficking cases. Representatives from this police district described that they relied on how assumed victims would accept to cooperate with them after receiving information about their entitlement to protection and non-punishment as a victim.

The initial reflection period in Norway is not dependent on cooperating with the authorities. Instead this period is meant to give the victim a chance to recuperate and to think about whether or not she wants to press charges against her trafficker and testify in a case against him or her. This lack of a link between protection and prosecution at this stage is described as a problem by police officers; it hampers the investigation and under-communicates how important cooperation with the authorities actually is for the outcomes for victims. As cooperation is not a prerequisite at this initial stage, few victims give information to the police. Victims typically only formally 'report' the case

as the reflection period is about to expire.⁴⁵ The police respondents see this as an understandable response to the system and they believe the report comes at this stage because the one-year temporary residence permit mandates cooperation with the police. A representative of the prosecution explained how the prospect of a case going to court is weakened when victims delay giving information to the police: ‘The thought behind the reflection period is good, but the problem with giving people six months to reflect is that that is exactly what many do.’ By the time most report their traffickers to the police, technical evidence and witnesses that can corroborate her testimony have disappeared, he explains.

While victims are implicitly encouraged by the system to delay reporting to the police in order to secure as long a temporary residence permit as possible, their chances of obtaining a permanent residence is weakened because that depends on the case going to court. Reporting late also contributes to producing the result that we mentioned above: only a few of the cases of trafficking reported to the police end up being prosecuted. The police report that victims are often surprised when the investigation is closed down quickly and no one gets prosecuted.

A related issue is that a delay in sharing information with authorities can weaken the credibility of the victim, should the case go to court. An ‘ideal’ victim is devastated by the event, and willing to cooperate with the police without delay.⁴⁶ Delays can therefore be a reason for the police to not prioritise a case. Due to high costs linked to trafficking investigations, the police naturally prioritise stronger cases, and this mandates a victim who appears credible and willing to aid the police without thinking about how it will benefit her.

There are concrete instances where the link between protection and prosecution has been made relevant in court. Particularly impacting on the strategies of the defence and the deliberation of the judges is the fact that

⁴⁵ A police report has not necessarily been filed by the victim during the course of the reflection period and for that and other reasons, the police may not have initiated an investigation. If a victim files a report, the police are obliged to open an investigation, and if this happens towards the end of the initial reflection period, it usually also means that the victim will be granted the one-year work and residence permit that is issued when their presence in the country is necessary for the investigation (Brunovskis et al. 2010).

⁴⁶ R Strobl, ‘Constructing the Victim: Theoretical reflections and empirical examples,’ *International Review of Victimology*, vol. 11, 2004, pp. 295–311.

cooperation with police and prosecution can award assumed victims a temporary and permanent residence period respectively. The focus has been on how the legal protection of the defendant is infringed and the credibility of the witness' statement is weakened when the witness is receiving great rewards in return for testifying. These concerns are most explicitly stated in a court decision from Oslo City Court⁴⁷ in a large-scale case from 2008, which involved perpetrators and victims from Nigeria. While the case resulted in a conviction, the written sentence explicitly refers to how using a permanent residence permit to convince someone to testify may induce victims to give false testimony and that this possibility weakens the credibility of the testimony:

Testimonies given to the police and court in a situation where someone has a strong personal motive to give the testimony a particular content, can never have the same evidentiary value as in situations where the witness has nothing to gain from her testimony.

Even before the verdict in that particular case, police brought up some inherent problems with this way of linking protection and prosecution. Said one police representative:

Creating a system that promotes or presses forward statements, that are then presented in court, when the goal is a residence permit, harms much more than the victims, it harms the case.

One lawyer, experienced in serving as legal representative for victims in trafficking cases, also brought up how this way of linking protection and prosecution threatens due process:

In terms of the rights of the defendant, this creates a very dangerous situation: If someone says that they are a victim of trafficking, they are believed even if their story is not coherent. I believe that there are cases where one does not to a large enough degree problematize whether the story is told only to access rights; that there are cases that are not in reality trafficking, but that is handled as such.

In line with what we demonstrated in the last section, the failure to prosecute human trafficking produces some adverse consequences for victims. Once the

⁴⁷ 10-018699MED-OTIR/03.

credibility of the testimonies is questioned, it weakens the likelihood of a successful case and therefore also of a permanent residence permit.

Conclusion

We have argued in this article that the linking of protection and prosecution brings with it a number of practical complications for victims and their protection, as well as for the prosecution of traffickers. Policy discussions and documents tend to frame victims primarily as trauma patients in need of time, recovery and trust building, and consider less the implications of many victims being migrants and how this means that a residence permit can be extremely highly valued. Missing this aspect means missing the context for many victims' decision making and the pressures to cooperate that can ensue, even in cases where cooperation may not be in their best interest. We also show how protection of victims contingent on cooperation with authorities can have adverse effects on the prosecution of traffickers: it can undermine victims' credibility as witnesses when they are 'rewarded' with a residence permit; 'ideal' victims do not act out of self-interest. It can also, when organised in the way it is in Norway, cause delays in sharing information central to investigations and prosecution.

An overarching concern of this paper is the domination of a strong criminal justice focus in relation to policy, practice and discourse around human trafficking. That focus is not unique to the human trafficking field but has been discussed in research on sexual violence and feminist activism. These discussions have particular relevance and parallels here, given the dominant focus on sexual exploitation in international (and Norwegian) trafficking debates. It has been argued that criminal justice approaches towards various forms of sexual and sexualised violence have been prioritised by the women's movement to such a degree that it is affecting victims' access to rights and assistance. Legal strategies have perhaps been particularly central to Scandinavian feminism.⁴⁸ Their appeal is not difficult to understand, as law has such great definitional and practical consequences, not only by what understandings it brings forth, but also by what stories it silences.⁴⁹ As legal

⁴⁸ M L Skilbrei and C Holmström, *Prostitution Policy in the Nordic Region: Ambiguous sympathies*, Farnham, Ashgate.

⁴⁹ N Henry, 'The Fixation on Wartime Rape: Feminist critique and international criminal law', *Social & Legal Studies*, vol. 23, 2014, pp. 93–111.

strategies are important instruments for feminist battles for justice and recognition, low conviction rates are read as evidence of political and cultural failures. However, this further justifies creating conditions for (or alternatively, increasing pressure towards) victims to come forward and testify, and uncritically marries the interests of feminism and the criminal justice system. Wendy Larcombe⁵⁰ urges feminists to carefully consider whose interest convictions serve, instead of just accepting the dominant notions about preventive and transformative power of criminal justice.

Victims of sexual and sexualised violence talk about pressure to report by those who have demanded rights on their behalf.⁵¹ And following cooperation it may be difficult for the victim/witness to actually take care of her own interest. This is parallel to what we have observed with victims of trafficking. While it is sometimes claimed that testifying is inherently empowering,⁵² we argue that this is not a given, and to the contrary, that it can be a process that is both disempowering and unpredictable.

An important issue is whether legal strategies, while beneficial for ‘the cause’, are harmful for the victim/witness. Several have written on how trials on sexual and sexualised violence may be retraumatising for victims.⁵³ In addition to the prospective harm of being questioned in detail about the violence experienced, the court setting requires a particular narration of the events, where ambiguity and agency may need to be left out in order to produce the victim as ‘ideal’, something which may impact on the victims’ recovery process.⁵⁴

When prosecution and criminal justice are prioritised, this also reflects a deeper understanding of what human trafficking is about and how it can best be addressed. When victims are given protection based on cooperation to achieve prosecution, this can be read as their exploitation being a question *primarily* of criminal acts. However, most cases of trafficking that we have encountered have not merely been about cynical criminals misleading and exploiting

⁵⁰ W Larcombe, ‘Falling Rape Conviction Rates: (Some) feminist aims and measures for rape law’, *Feminist Legal Studies*, vol. 19, 2011, pp. 27–45.

⁵¹ L Hengehold, ‘Remapping the Event: Institutional discourses and the trauma of rape’, *SIGNS*, vol. 26, 2000, pp. 189–214.

⁵² See for instance Haynes, 2004.

⁵³ B Krahé and J Temkin, ‘Addressing the Attitude Problem in Rape Trials: Some proposals for methodological considerations’ in M Horvath and J Brown (eds.), *Rape: Challenging contemporary thinking*, Willan, Collumpton, 2009, pp. 301–321.

⁵⁴ Hengehold, 2000, p.198.

victims, but have been anchored in a deeper, structural vulnerability on the part of those exploited. It is not simply a question of ending trafficking by eradicating organised crime. A dominant criminal justice approach deflects focus from the pressing need to address deeper, structural conditions that continue to facilitate exploitation.

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Transaction Costs: Prosecuting child trafficking for illegal adoption in Russia¹

Lauren A McCarthy

Abstract

As primary implementers of laws on human trafficking, law enforcement helps construct how these laws are understood and applied. This article examines how this process has unfolded in Russia by looking at the phenomenon of and debates surrounding child trafficking for illegal adoption. It argues that pre-existing experience with trafficking laws and cultural narratives surrounding adoption have led law enforcement to focus on uncovering evidence of monetary transactions rather than exploitation when prosecuting trafficking cases. This construction of the meaning of trafficking comes with important trade-offs. While the emphasis on transactions helps law enforcement to be successful at prosecuting cases involving selling children for illegal adoption, a focus on transactions rather than exploitation results in a *de facto* prosecution policy that ignores the many forms of exploitation that occur in other trafficking cases.

Keywords: child trafficking, prosecution, Russia, illegal adoption, transactions

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Introduction

In nearly all countries that have criminalised human trafficking, the emphasis on prosecution has put police, prosecutors and judges on the front lines of constructing how laws on trafficking are understood and applied. Further complicating matters, these laws are not implemented on a blank slate. Cultural conceptions about what trafficking is and pre-existing law enforcement practice impact how these new laws and concepts are incorporated into day-to-day practice. Child trafficking for illegal adoption is one area where these pre-existing conceptions matter. Illegal adoption is not included in the international protocol on human trafficking and many countries criminalise it separately.² Yet, as Liefesen points out, in discussions on illegal international adoption, there is a ‘marked tendency to identify more and more activities and operations with the trafficking label’.³ This article uses the controversy over child trafficking for illegal adoption in Russia to show how understandings of trafficking become established over time and how those understandings then impact prosecution policy.

In 2008, an amendment to the Russian law on human trafficking re-established that the activity of buying and/or selling a person constituted trafficking regardless of whether it was done for an exploitative purpose.⁴ Consequently, for Russian law enforcement, the key defining element of trafficking has

² *The UN Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children* (hereafter Trafficking Protocol), an optional protocol to the *UN Convention against Transnational Organized Crime* is the international treaty regulating human trafficking. Because illegal adoption is not specified as a form of exploitation under the Trafficking Protocol, there remains a legal grey area regarding whether trafficking has taken place when children are bought, sold, traded or given away for illegal adoption, whether domestically or transnationally. One of the means outlined in the protocol ‘giving or receiving payments or payments of benefits to achieve the consent of a person having control of another person’ could be interpreted as covering illegal adoption, but its meaning has not been elaborated in the protocol or its accompanying explanatory documents. Russia became a signatory to this protocol in 2000 and ratified it in 2004. A T Gallagher, *The International Law of Human Trafficking*, Cambridge University Press, New York, 2010. p. 40, 66–67; D Smolin, ‘Intercountry Adoption as Child Trafficking’, *Valparaiso University Law Review*, vol. 39, 2004, p. 281. However, another international instrument, Article 2 of the *Optional Protocol to the Convention on the Rights of the Child* (CRC) on the sale of children, child prostitution and child pornography, selling children is clearly prohibited. Russia became a signatory to this protocol in 2012 and ratified it in 2013.

³ E Liefesen, ‘Child Trafficking and Formalisation: The case of international adoption from Ecuador’, *Children & Society*, vol. 22, 2008, p. 213.

⁴ Russian law enforcement and Russian law does not interpret ‘buying-selling’ to include transactions arising from forced prostitution or other forced labour. The concept of buying-selling is limited to the sale of a whole person (or parts of a person, if for organs) not his/her services.

become the transaction—a direct monetary exchange in which the object of sale is a person—rather than the more imprecise concept of exploitation, as outlined by international protocols and conventions to which Russia is a signatory. The characterisation of trafficking as a transaction comes directly out of a domestic narrative and political climate that, since the 1990s, has been focussed on exposing foreign adoptive parents, particularly Americans, who ‘bought’ Russian babies from orphanages for nefarious purposes or harmed them in some way. These narratives are coupled with law enforcement’s experience in implementing a 1995 law on trafficking in minors that focussed almost exclusively on transactions, creating expectations about what forms trafficking takes and experience prosecuting such cases. A focus on transactions has had notable consequences for prosecution policy. On the one hand, it has enabled law enforcement to be quite successful at prosecuting child trafficking for illegal adoption, which is almost always accomplished via a direct monetary transaction. This includes both child trafficking rings and individual parents selling their children, often out of desperation, rather than giving them up to state care. On the other hand, it has resulted in a *de facto* prosecution policy that prioritises cases in which transactions occur, while overlooking the subtler forms of exploitation that can occur in sex and labour trafficking situations where direct transactions rarely take place.

This research is based on a larger project which uses a unique dataset of publically available Russian language news media articles (e.g., television transcripts, newspapers, online reporting), court documents and information from court websites to follow cases of human trafficking through the Russian criminal justice system.⁵ Data was collected from December 2003 through December 2013, though cases that remained open past December 2013 were also included with a final update in May 2015. News articles were coded for details about the offence, the offender, the victims and the crime’s progress through the criminal justice system, including a detailed narrative of each case. The data used in this paper include fifty-six incidents of child trafficking for illegal adoption culled from approximately 750 news articles and court documents from seventeen

⁵ For a more detailed description of methodology, see: L McCarthy, *Trafficking Justice: How Russian police enforce new laws, from crime to courtroom*, Cornell University Press, Ithaca, 2015. I do not use official Russian law enforcement statistics due to the difficulty of accessing them and the fact that, even when accessible, they do not disaggregate data by type of trafficking.

of those cases.⁶ Additional information comes from interviews conducted with over 150 law enforcement professionals, activists and experts in Russia between 2007 and 2013.

Public Sentiment and Domestic Politics on Adoption

When considering how trafficking prosecution patterns have developed in Russia, it is instructive to understand the cultural context into which Russia's 2003 trafficking laws were passed and implemented. The Russian narrative about child trafficking has been deeply influenced by the significant increase in international adoption that occurred in the post-Soviet period and the sensationalistic media coverage of situations of abuse. These narratives established that child trafficking was closely connected to illegal adoption and identified the buying and selling of children as the core of the problem.

In the aftermath of the breakup of the Soviet Union and the political and economic turmoil that followed in Russia, many children were abandoned by their parents and left in state care. Foreign adoption became a booming business as reports of the plight of Russian orphans made it to the West. Between 1995 and 2013, nearly 87,000 children were adopted out of Russia. Adoptions to the United States made up the biggest percentage of foreign adoptions, with over 58,000 Russian children finding homes in the United States during that period.⁷ Russians have never been comfortable with the idea that their babies are being taken by foreigners to be raised outside of Russia, especially amidst a demographic crisis. They are ashamed that the government and society cannot properly take care of its own and disdainful of the idea of commodifying children in what they see as largely

⁶ Cases are referenced by their database identification number throughout this article. Basic information on all cases is located on the author's website: <http://people.umass.edu/laurenmc/traffickingjustice>

⁷ Spain, Italy and France were the next three most popular adoption destinations, but even when combined, they still amounted to less than half of the number of Russian adoptees that went to the United States. See: <http://www.aican.org/statistics.php?region=0&type=birth> Also see: J McKinney, 'Russian Babies, Russian Babes: Economic and demographic implications of international adoption and international trafficking for Russia', *Demokratizatsiya*, vol. 17, 2009, p. 19; and A High, 'Pondering the Politicization of Intercountry Adoption: Russia's ban on American "Forever Families"', *Cardozo Journal of International and Comparative Law*, vol. 22, 2014, p. 497.

transactional family formation.⁸ Furthermore, the idea that their children are being taken and raised by capitalist Americans, who are seen as preying on Russia's weakness after its Cold War defeat, has strong resonance in a nation proud of its once powerful position on the world stage. This unease is evidenced by the frequent calls for more extensive regulation and monitoring of the fate of adoptees in their new families, especially following cases of abuse by adoptive parents that feature prominently in the media.

Russians often cite the statistic that twenty Russian children have been killed by their adoptive American parents.⁹ This claim is coupled with speculation and rumours of children being taken for abusive purposes (e.g., organ extraction, prostitution, or sexual abuse). Several cases that have come to light over the past two decades have served to confirm these fears. In 2001, Nadezhda Fratti, a dual Italian and Russian citizen was arrested on suspicion of bribing officials over a seven-year period to speed over 1,200 adoptions of Russian children to Italy, for which she received substantial payments. The fact that only five of these children were able to be tracked down led to widespread speculation that they were taken for exploitative purposes, though there was no evidence that anything untoward happened to them.¹⁰ In 2005, American Matthew Mancuso was convicted in the United States of incest and raping his young daughter who had been adopted from Russia; he had also distributed photographs of her on child pornography websites.¹¹ Despite the fact that side payments and gifts, most often to orphanages and their employees, were very common in adoptions at the time,¹² in all of the cases of adoption-gone-wrong covered by the media, the focus was always on the transactional aspects of the situation. Adoptive parents had bribed someone to get these children or to get around proper screening, otherwise these tragedies could not possibly have taken place.¹³ Thus, the focus on the transactional aspect

⁸ See: McKinney; L. Khabibullina, 'International Adoption in Russia "Market," "Children for Organs," and "Precious" or "Bad" Genes' in D Marre and L Briggs (eds.) *International Adoption: Global inequalities and the circulation of children*, New York University Press, New York, 2009, pp. 174–189.

⁹ This statement was repeated by officials at every conference I attended on human trafficking in Russia.

¹⁰ After five separate trials, she was convicted in 2010 of bribing officials and falsifying documents and received a four-year probationary sentence. N Popova, 'Погашая радуга', *Argumenti Nedeli*, 31 March 2011, vol. 12, no. 253.

¹¹ Khabibullina

¹² McKinney

¹³ In the Mancuso case, this was true. The home visit conducted by the adoption agency took place over the phone and neither his ex-wife nor his daughter was interviewed before he was cleared to adopt.

of child trafficking and illegal adoption is part of a narrative that has been in circulation for two decades.¹⁴

Child Trafficking for Illegal Adoption in Russia: 2003–2013

Despite beliefs about the purchase of children by foreign adoptive parents, none of the cases of child trafficking for illegal adoption prosecuted by Russian law enforcement from 2003 to 2013 reflect this narrative.¹⁵ Media reports and case documents from this time period show two types of child trafficking for illegal adoption in Russia: organised child-selling and one-off sales of children by parents.

Organised child-selling rings seek out new-born babies to sell, usually to childless couples. Between 2003 and 2013, ten of these were uncovered by Russian law enforcement. They are generally fairly small, but have a clear organisational structure. Each group has at least one member (usually a woman) who is connected to a maternity hospital as a doctor, nurse or midwife or has close connections with one of these people. These medical professionals are in a position to convince women or girls who are giving birth at the hospital to sign away their parental rights. Other members of the group then work as middlemen to falsify paperwork enabling the illegal adoption to take place. In all but one of these situations, the children were new-borns when they were sold, most less than a week old. The prices for children appear to be more or less fixed by the group, sometimes with differential pricing for boys

¹⁴ This narrative is not unique to Russia. For a description of similar scandals in Ecuador, see Liefesen.

¹⁵ The one exception was a case that was largely opened for show after a Reuters news report found that parents of children adopted to the United States, including twenty-six from Russia, had used various Internet bulletin boards to facilitate ‘re-homing’ of the children. The adoptive parents transferred custody rights over the children through private arrangements to people they met in the chat rooms and several of the children ended up in abusive new homes with parents who had already had their biological children removed from their care. See: M Twohey, ‘The Child Exchange’, *Reuters*, 9 September 2013; A Anishchuk and M Twohey, ‘Russia launches criminal inquiry into U.S. child exchanges’, *Reuters*, 25 December 2013.

and girls. In a 2006 case from Chechnya, the price for new-born boys was 110,000 roubles (USD 3,928) and for girls, 80,000 roubles (USD 2,857) (#11).¹⁶ By 2012, when another case was discovered there (#420), the price had increased four-fold. New-born boys were being sold for 500,000 roubles (USD 17,857) and new-born girls for between 350,000 and 400,000 (USD 12,500-USD 14,285).

Most of the women who give their babies to these trafficking rings are not paid by the traffickers, but instead did not want to have a child or were already thinking of giving the child up after it was born. In other cases, the babies were obtained through deception. In one case (#420), a young girl gave birth in a Dagestan hospital after which the nurse told her that the child had a congenital disorder when in fact he was perfectly healthy. Consequently, she signed away her parental rights in the hospital and the child was taken by the trafficker and sold in Chechnya. In defending their actions, members of these rings say that they are simply trying to find good homes for unwanted children or helping infertile couples and they insist that they screen the adoptive families carefully to make sure that they have financial stability and can take care of the children. This reasoning does not seem to hold much weight with law enforcement or the courts who hand out harsh sentences in these cases.

In one-off child trafficking situations, parents are looking to sell their child out of desperation. Once caught, the parent (usually the mother) almost always identifies financial difficulties as the reason she sold the child. In one case in the Perm region (#390), the selling parents were unemployed and already had a daughter with disabilities. They planned to use the money from the sale of their three-month-old daughter to buy their own apartment. Another woman in the Kemerovo region had run into trouble with the law and said she needed the money for bribes to get out of being criminally prosecuted for stabbing her boyfriend during a drunken dispute (#111). Some of the sellers are described as alcoholics or drug addicts, many of them have had previous run-ins with the law and almost all of them are unemployed. Fathers are frequently absent and there may be other children at home already. In other cases, children are born to women who are temporarily in Russia for work (legally or illegally) and who are barely subsisting on their own or with

¹⁶ All monetary values are calculated at twenty-eight roubles to the dollar, the average for the time period under study.

the other children that they already support. Russian law enforcement uncovered 46 cases of one-off child trafficking from 2003 to 2013.

In most of these cases, the parent begins looking for a buyer for his/her child among friends, neighbours or the community and only rarely advertises publicly. Once a buyer is identified, price negotiations begin. In several cases, the parent started with a much higher price but quickly came down to meet the potential buyer at whatever price they were offering, at times less than half the starting price. In one example, the buyer, who was cooperating with the police at the time of the purchase, had originally agreed to pay 26,000 roubles (USD 928) for the child but when she showed up to make the purchase, she only had 6,000 roubles (USD 214) in cash on her. In a clear display of how desperate she was for any money at all, the mother took the money and gave her the baby (#509). In contrast to organised groups where the prices are consistent, in the one-off sales, there is wide variation. Children were sold for as little as sixty roubles (USD 2) and as much as 4 million roubles (USD 142,000).

In the eyes of Russian law enforcement, and by extension the Russian state, what makes this criminal is the intent to profit from the sale of the child rather than give it up to a state orphanage facility. Equally important is the view that by selling the child to an unknown buyer who has unclear intentions, the parent is unacceptably risking the child's well-being when compared to the care the child would receive at a state facility. These feelings are echoed in society at large. When these cases are covered in the mainstream media, it is rarely with any empathy for the parents who are usually painted as heartless, immoral demons and drunks rather than desperate people who feel that this is their only choice. Media coverage places particular emphasis on the lack of emotion and indifference shown by the parents at the moment when they hand their child over to the buyer. In one news report about a case in Khabarovsk, the news agency wrote of the mother: "The policeman met with the woman several times to negotiate the deal...She didn't even once show interest in why a male stranger would buy a little boy."¹⁷

¹⁷ vostokmedia.com, "“Добруто” маму из Бикина, которая чуть не продала сына за, 300 тысяч осудили на три года", 12 November 2012.

In almost all cases of child trafficking for illegal adoption, whether committed by organised rings or by individual parents, the children who were illegally sold were located in Russia and taken into state care or placed with relatives. Because most of these were interdicted by law enforcement posing as buyers, we cannot know whether the children would have been adopted and exploited by unscrupulous foreign parents, but the patterns of sale described here indicate that this is unlikely. Most people looking to sell children looked first within their own social networks and locally, making it unlikely that they would have found international buyers. The timing of interdiction also means that no adoptive parents were pursued. In the only case (#38) in which adoptive parents were mentioned, the Verzhbitskaya case described in more detail below, prosecutors encouraged the adoptive families to come forward to re-do the adoption paperwork properly so they could keep the children (none did). This suggests that the motives of adoptive parents who want to give a baby a loving home are considered less questionable by law enforcement than those of a person who sells babies ‘for profit’.

Constructing the Legal Meaning of Trafficking

The way that Russian law enforcement has responded to child trafficking for illegal adoption has also been influenced by their experience enforcing a 1995 law criminalising trafficking in minors (торговая несовершеннолетними), which was passed in response to the fears of foreigners buying Russian children. The statute remained in the new Criminal Code when it was passed the following year.¹⁸ Trafficking in minors was defined in Article 152 of the Criminal Code as ‘buying-selling of a minor or the commission of any transactions involving the giving or receiving a minor’ and punishable by imprisonment up to five years. For the eight years this law was on the books, at least 162 cases of this type were registered by law enforcement.¹⁹

¹⁸ К Волков, ‘Торговая несовершеннолетними: Вопросы ответственности и совершенствования практики правоприменения’, *Rossiiskii Sledovatel* vol. 10, 2007, p. 12.

¹⁹ There are three years of missing data (1996, 1998 and 1999). Data for 1995 and 1997 from TS Volchetskaya and Iu Usenko ‘Криминалистическая характеристика преступлений, связанных с похищением несовершеннолетних и торговлей ими’ in *Optimizatsiia Ugolovnogo Sudoproizvodstva: Sbornik nauchnykh trudov*, pp. 89–92. Data from 2000–2003 on file with author.

In 2003, three years after signing the Trafficking Protocol, Russia's legislature criminalised human trafficking with an amendment to the Criminal Code. This statute encompassed adult victims as well as children. Because the new trafficking statute included the aggravating factor 'trafficking a known minor', legislators thought it would be redundant to keep Article 152 and so it was eliminated. The trafficking statute was a hybrid of the previous Criminal Code article on trafficking in minors and the definition of trafficking as outlined in the Trafficking Protocol. It kept the term 'buying-selling',²⁰ which is nowhere in the Protocol, but it also included a nearly verbatim recitation of the acts that constitute human trafficking and the purpose of exploitation, as defined in the Protocol.²¹ Scholars have suggested that this mixed wording was intended to create an understanding of the new crime that was as close as possible to one that law enforcement would already recognise.²² The 2003 Russian law defined human trafficking in Criminal Code Article 127.1 as: 'Buying-selling, or the recruitment, transportation, transfer, harbouring or receiving of a person for the purpose of their exploitation.' Exploitation is defined as including: using the prostitution of others and any other form of sexual exploitation, slave labour or services, servitude or the removal of organs or skin. Sentences are up to fifteen years for the most severe forms of trafficking.

The change in focus from transaction to exploitation as the defining element of the crime made Russian law enforcement believe that selling children had been decriminalised because most children were sold to families for adoption, and adoption was not outlined as an exploitative purpose in the trafficking statute. This interpretation was supported by a number of legal scholars writing on the new law, many of whom called for amendments to correct this deficiency.²³ Under this interpretation, if law enforcement wanted to prosecute

²⁰ Russia was not the only post-Soviet country to do this. Uzbekistan, Lithuania, Belarus and Georgia all have definitions of trafficking that include buying-selling.

²¹ Unlike the Trafficking Protocol, the Russian statute does not include a list of the means by which someone could be trafficked.

²² I Alikhadzhieva, 'Недостатки законодательной регламентации уголовно-правовой борьбы с торговлей людьми', *Ugolovnoe pravo* vol. 5, 2006, p. 4.

²³ A A Chekalin, ed. *Kommentarii k Ugolovnomu kodeksu Rossiiskoi Federatsii*. 3rd ed. Moscow: Iurait-Izdat, 2006; T Dolgolenko, 'Уголовная ответственность за торговлю людьми' *Ugolovnoe pravo*, vol. 2, 2004, p. 23; Alikhadzhieva 2006; K Volkov and D Ivashkin, 'Торговля людьми в Дальневосточном федеральном округе: попытка криминологической оценки', *Vestnik DV Iul MVD Rossii*, vol. 1, 2008, p. 14.

someone for selling a child, they first had to establish that the seller knew that the child would be exploited. Consequently, law enforcement officials who were committed to pursuing these cases had to get creative. In arranging undercover purchases of babies, they would explicitly tell the sellers that they intended to use the child for one of the exploitative purposes outlined in the law, usually for prostitution, begging or organ transplant. If the parents still went ahead with the sale, law enforcement considered this enough to prove intent and would charge the parents with buying-selling for the purpose of exploitation. All successful prosecutions of child trafficking for illegal adoption from 2003-2008 used this strategy.

In one example from the Sverdlovsk region in the Urals (#57), an Uzbek woman tried to sell her four-month-old daughter for 20,000 roubles (USD 714). When law enforcement officials caught wind of the plan, they arranged a fake purchase with an undercover female officer posing as the buyer who told the mother that her baby would be used for begging, a form of exploitation covered by the trafficking law. She did not change her mind and as soon as the money and the baby changed hands, she was arrested. In Novosibirsk, a father sold his ten-day-old daughter for USD 10,000 to undercover law enforcement agents who told him that the baby's kidneys would be removed and given to another child (#205). He was described as showing little interest in the ultimate fate of his child and was arrested after the transaction took place.

In the first several years after the trafficking law was passed, this perceived gap in the law was highlighted in every case of child selling for illegal adoption that came to the media's attention. The most prominent of these was the 2005 case of Ludmila Verzhbitskaya, a Moscow woman who was organising illegal adoptions for pay. She approached friends who worked in abortion clinics to find women who were in late stages of pregnancy and did not want their babies. Rather than having abortions, she convinced the women to give up their babies and falsified their participation in a surrogate mother programme. Verzhbitskaya paid each of the women USD 1,000-1,500 for their participation and then sold their babies to childless couples for USD 20-25,000 each. She sold at least four babies in this way, including one to a German couple, which is what brought the case to the attention of the authorities. Though the case was originally charged under the human trafficking statute, the court reclassified it, instead charging her with falsifying documents and actions contrary to the order presented by law (Article 330—*самоуправство*). She was fined 350,000 roubles (USD 12,500). One of the police investigators described the difficulties in bringing Verzhbitskaya to justice:

‘Unfortunately, for unclear reasons, the statute “Trafficking in Minors” was removed from the Criminal Code. We simply cannot now find a statute to deal with these kinds of people. The justice system has shown that...these activities are not considered to be such serious crimes. The court’s decision is a testament to that fact.’²⁴ Dissatisfied with her punishment, the prosecutors brought additional charges for kidnapping for which she was eventually convicted and received a seven year probationary (non-prison) sentence.

Despite the fact that the 2003 trafficking law could have been read to make buying-selling a crime on its own with the comma after ‘buying-selling’ being interpreted more like a semicolon, law enforcement agents like the one quoted above insisted that their hands were tied in cases of illegal adoption because there was no exploitation. The only other Criminal Code provision that could be used for these types of crimes was ‘illegal adoption’ (Article 154) but it required that the activity take place multiple times or with the intent to profit.²⁵ Lawmakers were not pleased at what they considered a misinterpretation of the statute. In response to accusations by law enforcement that the Duma had *de facto* legalised child trafficking, Pavel Krasheninnikov, head of the Duma’s Legislative Committee accused law enforcement of incompetence:

There has been no legalization of child trafficking in our country....If earlier there was a ‘partial’ law, Article 152 (trafficking in minors), now there is a broader and more general statute, Article 127.1 (human trafficking) which provides for harsh punishment. The number of the statute has changed, but not its content, the statute reads ‘human trafficking’ so if there is a fact of trafficking, a criminal case should be opened. And buying-selling, that’s separate. What is written after that should be read as ‘or recruitment with the goal of exploitation, or transfer with the goal of exploitation, or harbouring with the goal of exploitation....’ It is a legal technicality. And those who don’t know that ought to relearn the basics. It’s not a problem with the Criminal Code, but with the Procuracy [prosecutor’s office].²⁶

²⁴ В Korablev, ‘Младенцы под раздачу’, *Vremia Novosti*, 30 November 2005.

²⁵ Punishment for the offence can be a fine up to 40,000 roubles or equivalent to three months’ pay, community service up to 350 hours, corrective labour up to a year, or arrest for up to six months. It is notable that in this entire period, not a single case was convicted under this law, showing it was not considered by law enforcement to be an adequate or useable substitute.

²⁶ В Korablev, ‘Два года на два слова’, *Vremia Novosti*, 18 March 2008.

Ultimately, law enforcement's wishes carried the day. In 2008, an amendment was made to the Criminal Code article on human trafficking to specify that buying-selling or any transaction involving a person could stand alone as a crime and did not require law enforcement to prove it was done for the purpose of exploitation. During the hearing on the amendment, Krasheninnikov stated: 'From the academic point of view, "with the purpose of exploitation" is not a required element [of the crime], but in practice, we have gone down a path where implementers of the law always look for transactions with the goal of exploitation.'²⁷ Additionally, the aggravating factor of trafficking someone 'in a dependent state' was added to cover babies. Deemphasising the 'purpose of exploitation' as a required element of the trafficking crime was a significant departure from the internationally recognised definition of human trafficking which sees exploitation as *the* defining element of the crime.

Impacts on Prosecution Policy

Despite its departure from the predominant international understanding of trafficking, the 2008 amendment more closely corresponded to what Russian law enforcement already recognised as constituting the heart of the trafficking crime—the transaction. Consequently, they have been emboldened to focus primarily on transactions in all types of trafficking cases. In cases of child trafficking for illegal adoption, this strategy has brought them great success. After 2008, almost all cases of child trafficking charged under the human trafficking laws had successful convictions. In 2010 four of five were convicted, in 2011 six of six, and in 2012 ten of twelve, with one still ongoing at the time of publication. In 2013 these figures were four of seven with three still ongoing.²⁸ The charges in all the cases include the addition of two aggravating factors, 'trafficking a known minor' and trafficking those 'in a dependent state' which subjected them to sentences in the three to nine year range.

²⁷ Transcript of Parliamentary Hearings on 19 March 2008, State Duma of the Russian Federation.

²⁸ In 2009, the first year after the change, I could not find outcomes for three of the six cases opened. In the others, two cases had defendants who were convicted of human trafficking, and one was closed because the defendant was sent for psychiatric treatment.

For all child trafficking cases, sentences have been significant, despite many defendants accepting plea bargains.²⁹ Sentencing information was available for forty-one defendants in thirty of these cases. Of them, 73% were sentenced to prison time ranging from two to ten years (average 3.7). The other 27% of defendants received probationary (non-prison) sentences ranging from three to five years (average 3.6). Especially in the cases of desperate parents selling their children, court documents showed that the justice system had little sympathy for mitigating factors of poverty, single parenthood and/or unemployment. Though Russian law allows judges to take into account difficult life circumstances, pregnancy or having a young child at home, among other things, as mitigating factors in sentencing, they showed little inclination to do so.³⁰ For example, in one case a migrant couple from Uzbekistan were living in basements and sleeping on the streets while trying to support their children in Uzbekistan when the woman gave birth and they decided to sell the baby. Despite consideration of these circumstances, the judge still sentenced each of them to four years in prison (#333).

However, a focus on transactions comes with important trade-offs. Practically speaking, the strategy of focussing on a transaction can be difficult. Without information that a transaction of this type will actually occur, police cannot go undercover to capture it. This strategy requires significant proactive police work, something that is often too resource intensive for departments. More broadly, a focus on transactions elevates the importance of child trafficking at the expense of other forms of trafficking in which straightforward transactions are more the exception than the rule. In labour and sex trafficking cases, it is rare that victims become victims through a monetary transaction. Forms of recruitment are significantly more varied and include false employment offers, force, coercion and, on rare occasions, kidnapping. The transaction element has become so important to law enforcement that agents rarely identify any situation as trafficking if there is not an element of buying and selling. As one law enforcement agent in the city of Vladivostok told me about domestic sex

²⁹ The guilty plea, in Russian 'special procedure' (особы порядок), has been available since 2003 and allows the defendant to agree to the charges against him or her and cooperate with the investigation and in exchange receive a sentence of no more than two-thirds the statutory maximum and an abbreviated court hearing (Criminal Procedure Code Articles 314–317).

³⁰ Criminal Code Article 61.

trafficking in 2008, ‘If there’s no selling and no force involved, it’s not trafficking.’ A judge in Khabarovsk echoed this point by describing how the transaction made up a key element in trafficking prosecutions: ‘With human trafficking [cases], you have to find the seller, the buyer, the victim and question all of them and show the transactions.’ Between 2003 and 2013, almost all of the cases of domestic sex trafficking that were prosecuted in Russia involved a transaction, while an equal number of cases involving very serious sexual exploitation but no transaction were instead prosecuted under other statutes.³¹

It is also important to note that focussing on the transaction is a pragmatic choice for law enforcement. Human trafficking cases are complicated to investigate, requiring significant time, resources and training.³² Many law enforcement agencies tend to shy away from committing these resources, especially given that trafficking laws are often written unclearly and there is uncertainty about how they will be understood by other actors in the criminal justice system.³³ With a transaction, law enforcement needs only to capture the moment that the money and the person change hands on video and the conviction is virtually guaranteed. In one case in the Kaluga region (#333) the sentencing document showed that only three pieces of evidence were needed to prove the case: the video of the transaction, the marked money used in the exchange, and the child’s birth and vaccination certificates, which were given to the undercover officer at the time of the sale. Exploitation, on the other hand, is the end point of a series of other discrete actions (recruitment, transportation, transfer, harbouring, receipt) each of which have to be documented and proven along with the fact that the victim was exploited. This is inherently more complicated and resource intensive. As an investigator in Moscow told me in an interview in 2012, police strategy has increasingly focussed on undercover purchases of victims to uncover all types of trafficking precisely because it is so much easier to get a conviction if there is video evidence of the transaction. Additionally, focussing on the transaction helps clear cases quickly and with assured outcomes. Russian law enforcement

³¹ McCarthy. All forms of trafficking that are prosecuted under Article 127.1 (human trafficking) and 127.2 (use of slave labour), along with several other trafficking-like crimes (i.e. recruitment into prostitution; organising prostitution; distributing child pornography), are usually considered by the Russian government as trafficking for the purposes of reporting (i.e. for the annual United States Department of State’s *Trafficking in Persons Report*).

³² A Gallagher and P Holmes, ‘Developing an Effective Criminal Justice Response to Human Trafficking: Lessons from the front line’, *International Criminal Justice Review*, vol. 18, 2008, p. 318.

³³ McCarthy.

agents and departments are assessed primarily by quantitative indicators that are aggregated up the law enforcement hierarchy. Case clearance rates, which are compared from year to year, are the most important statistic.³⁴ Judges face similar pressures.³⁵ When caught in the act and faced with overwhelming evidence against them, many traffickers decide to plead guilty, guaranteeing an abbreviated investigation, shortened court procedure and, most importantly for law enforcement, a case clearance.

Conclusion

Russian law enforcement's pursuit of trafficking cases has been driven by a focus on the buying and selling of a person rather than the more amorphous and difficult-to-apply concept of exploitation that is the focus of international definitions. This fits well with cultural conceptions of child trafficking as deeply connected to illegal adoption and also fits with law enforcement's previous experience of using the law on trafficking in minors. Though the 2003 trafficking law used language that took this previous practice into consideration, it changed the focus just enough for law enforcement to believe that selling children had been legalised. When the law was amended in 2008, it again elevated buying and selling—the transactional element—to an equally important place in the legislative definition of human trafficking.

Ultimately, the narrow focus in Russia on trafficking as a transaction has had positive results in combating illegal adoption but has limited the attention law enforcement pays to the wider array of trafficking situations present on Russian soil. Understanding the genesis of law enforcement norms and practices surrounding human trafficking can help clarify how patterns of prosecution develop and are reinforced over time. As long as prosecution remains the primary focus of anti-trafficking policies, law enforcement will continue to define what anti-trafficking policy means on the ground. As this article has shown, these entrenched patterns of practice have significant strategic

³⁴ McCarthy; E Paneyakh et al. *Pravookhranitel'naia deiatel'nost' v Rossii: Struktura, funktsionirovanie, puti reformirovaniia, chast' 1: Diagnostika raboty pravookhranitel'nykh organov RF i vypolneniia imi politseiskoi funktsii*. St. Petersburg: European University at St. Petersburg Research Institute for the Rule of Law, 2012; E Paneyakh, 'Faking Performance Together: Systems of performance evaluation in Russian enforcement agencies and production of bias and privilege', *Post-Soviet Affairs*, vol. 30, 2014, p. 115.

³⁵ P Solomon, Jr., 'Accountability of Judges in Post-Communist States: From bureaucratic to professional accountability' in Anja Seibert-Fohr (ed.), *Judicial Independence in Transition*, Springer, New York, 2012, pp. 909–36.

impacts, privileging certain groups and certain types of trafficking over others, regardless of what the laws on the books state.

Though not related to prosecution policy *per se*, the treatment of desperate parents selling their children as criminals raises important policy questions about the state's responsibility for creating social policies and programmes that might offer support to families who feel that selling a child is the only way to survive. More attention to social programmes that deal with addiction, homelessness, unemployment, gender discrimination in hiring, and provision of kindergarten spaces and other child care programmes could go a long way in helping prevent many child trafficking situations from happening at all. Instead of developing policies to support families in difficult situations, the Russian government has focussed almost exclusively on stopping foreign adoptive parents from 'buying' Russian babies, a narrative that has stubbornly persisted in spite of the reality on the ground. Stories of abuse and neglect are highlighted, while stories of successful adoptions, both foreign and domestic, are not. This discourse has gone hand in hand with a gradual shuttering of international adoption and greater encouragement and incentives for Russian families to adopt domestically.³⁶

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³⁶ For discussions on the history of Russian adoption laws and bilateral agreements between Russia and other countries, see High 2014; C Allen, 'The US-Russian Child Adoption Agreement: An end to failed adoptions?', *Fordham International Law Journal*, vol. 35, 2012, p. 1690; M Hora, 'A Standard of Service that All Families Deserve: The transformation of intercountry adoption between the United States and the Russian Federation', *Brandeis Law Journal* vol. 40, 2002, p. 1017; L Martin, 'The Pavlis Murder and Why Russia Changed the Russian Family Code and Policy on Foreign Adoptions', *Penn State International Law Review*, vol. 26, 2007, p. 709.

The Prosecution of State-Level Human Trafficking Cases in the United States

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Abstract

In an effort to combat human trafficking, the United States federal government and all fifty states passed new laws that criminalise human trafficking and support the identification and prosecution of human trafficking perpetrators. Despite the passage of these laws, only a small number of human trafficking cases have been prosecuted in the last fifteen years. Guided by the notion that prosecutors seek to avoid uncertainty when making decisions to pursue criminal prosecution, we explore how human trafficking crimes are indicted under these newly defined state laws. Using a sample of cases from twelve US counties and interviews with police, prosecutors and court personnel, we examine the factors that influence the decision to prosecute crimes investigated as human trafficking in state court. This research informs our understanding of why so few human trafficking cases are prosecuted and why human trafficking suspects are rarely convicted of trafficking offenses.

Keywords: prosecution, human trafficking, law reform, uncertainty avoidance

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Introduction

In response to growing concerns about human trafficking, the United States [US] federal government passed the Victims of Trafficking and Violence Prevention Act in 2000 (TVPA).¹ Following the model of the TVPA, as of 2015, all fifty states had also passed laws criminalising acts of human trafficking. Federal and state legislation included enhanced penalties for perpetrators and increased protections for victims.² Further, many states have created task forces to help with prosecuting human trafficking cases, as it became apparent that states are most likely to locate and identify instances of human trafficking at the community level, and not all human trafficking cases meet federal jurisdiction. Since passage of the TVPA in 2000, 1,876 suspects have been prosecuted for federal human trafficking offences³ and roughly 450 suspects have been prosecuted for state-level human trafficking crimes.⁴ Understanding the context of human trafficking prosecutions is important since public officials and opponents of current anti-trafficking policies have argued that the relatively small number of prosecutions in the US provides evidence that the seriousness and prevalence of human trafficking has been exaggerated.⁵ Additionally, human trafficking prosecutions and convictions are a common metric upon which a government's anti-trafficking response is judged.⁶ The TVPA itself lists prosecution and punishment of human traffickers as one of its primary purposes, along with protection of identified human trafficking victims and prevention of human trafficking.

¹ The TVPA defines severe forms of trafficking in persons as 'sex trafficking in which a commercial sex act is induced by force, fraud, or coercion, or in which the person induced to perform such an act has not attained 18 years of age; or the recruitment, harboring, transportation, provision, or obtaining of a person for labor or services, through the use of force, fraud, or coercion for the purpose of subjection to involuntary servitude, peonage, debt bondage, or slavery' (TVPA of 2000, section 103, 8a and b).

² B Stolz, 'Interpreting the US Human Trafficking Debate through the Lens of Symbolic Politics', *Law & Policy*, vol. 29, 2007, 311–333.

³ See: Attorney General's Annual Report to Congress and Assessment of US Government Activities to Combat Trafficking in Persons, 2010, 2011, 2012, 2013, 2014 and 2015.

⁴ V Bouche, A Farrell and D Wittmer, *Identifying Effective Counter-trafficking Programs and Practices in the US: Legislative, legal, and public opinion strategies that work*, Washington DC: National Institute of Justice, 2015.

⁵ R Weitzer, 'Sex Trafficking and the Sex Industry: The need for evidence-based theory and legislation', *The Journal of Criminal Law & Criminology*, vol. 101, 2012, 1337–1370; W McDonald, 'Trafficking Counts, Symbols and Agendas: A critique of the campaign against trafficking in human beings', *International Review of Victimology*, vol. 11, 2004, 143–176.

⁶ For examples, see: US Department of State *Trafficking in Persons Report* series (2010–2015); and the UN Office on Drugs and Crime *Global Report on Trafficking in Persons*, 2009, 2014.

To date, there have been few empirical examinations of the factors that influence local prosecution of human trafficking crimes, and thus little is known about the effectiveness of state human trafficking laws. The few studies that have examined human trafficking prosecution have focussed on federal prosecution.⁷ Studies examining state use of human trafficking laws generally focussed on ambiguity in these laws and the challenges of developing new legal standards.⁸ For example, prosecutors are often unaware that their state has a trafficking law and are unfamiliar with the legal elements necessary to prove a trafficking charge.⁹ Parallels are often drawn between human trafficking and other sensitive crimes like sexual assault and domestic violence, but research is needed to understand whether the same factors that inhibit the prosecution of other sensitive crimes explain prosecutorial decisions in new state human trafficking crimes.

Using data from a sample of state-level human trafficking cases, supplemented with information from interviews with police, prosecutors and other court personnel in twelve US counties, this exploratory study examines the type of charge used to prosecute state-level human trafficking cases and the factors that influence the decision to prosecute. Our analysis is guided by uncertainty-avoidance theory, which posits that prosecutors are less likely to prosecute cases if they are uncertain about the outcome of obtaining a conviction.¹⁰

Although this study provides one of the first quantitative assessments of trafficking prosecutions to-date, there are a number of important limitations that must be taken into account when considering its findings and the conclusions drawn from them. The data collected for this study are from trafficking cases prosecuted between 2000 and 2010 and most likely representative of the ‘first generation’ of state-level human trafficking prosecutions. Since that time there have been numerous efforts to train state prosecutors about human trafficking and some states have developed

⁷ H Clawson et al., *Prosecuting Human Trafficking Cases: Lessons learned and promising practices*, ICF International, Washington DC, 2008.

⁸ A Reiger, ‘Missing the Mark: Why the Trafficking Victims Protection Act fails to protect sex trafficking victims in the United States’, *Harvard Journal of Law and Gender*, vol. 30, 2007, 231–256; M Wade, ‘Prosecution of Trafficking in Human Beings Cases’ in J Winterdyk, B Perrin and P Reichel (eds.), *Human Trafficking: Exploring the international nature, concerns and complexities*, CRC Press, Boca Raton, FL, 2012; A Farrell, C Owens and J McDevitt, ‘New Laws But Few Cases: Understanding the challenges to the investigation and prosecution of human trafficking cases’, *Crime, Law and Social Change*, vol. 61, 2014, 139–168.

⁹ Newton, Mulcahy and Martin, 2010.

¹⁰ C Albonetti, ‘Prosecutorial Discretion: The effects of uncertainty’, *Law and Society Review*, vol. 23, 1987, 291–313.

specialisation among a small number of prosecutors who have experience developing human trafficking cases.¹¹ In the ‘second generation’ of human trafficking prosecutions we might expect more and a broader array of different types of trafficking cases to be pursued. In the data analysed here, state-level human trafficking prosecutions included only sex trafficking offenders. It is also possible that different factors may predict prosecution decisions about pursuing human trafficking charges in the second generation of cases. Additionally, the sample of jurisdictions studied here is not nationally representative; conclusions about the prosecution of human trafficking cases are only generalisable to the twelve counties studied. Future research should attempt to replicate these findings using more recent prosecution data from a larger sample of jurisdictions.

Background

In the US prosecutors have considerable discretion in making decisions about criminal cases and are generally immune from review when rejecting charges.¹² Prosecutors may exercise discretion by declining to prosecute cases that are brought to their attention or by charging offenders with more or less serious crimes.¹³ The power of prosecutorial discretion is kept in check by a unique set of ethical obligations. Prosecutors are responsible for the vigorous prosecution of offenders and to the service of justice, which requires consideration of the interests of those who they prosecute.

Research suggests that prosecutors commonly make charging decisions based on the likelihood of conviction.¹⁴ Successful convictions are markers of ethical

¹¹ For example, the National Association of Attorneys General constituted a committee on human trafficking prosecutions in 2011. Their website houses numerous publications aimed at improving state prosecutor knowledge of human trafficking laws and the challenges of developing human trafficking cases. See: <http://www.naag.org/naag/committees/naag-special-committees/human-trafficking-committee.php>

¹² W Lafave, ‘The Prosecutor’s Discretion in the United States’, *The American Journal of Comparative Law*, vol. 18, 1970, 532–548; C Spohn, D Beichner and E Davis-Frenzel, ‘Prosecutorial Justifications for Sexual Assault Case Rejection: Guarding the “gateway to justice”’, *Social Problems*, vol. 48, 2001, 206–235.

¹³ J Spears and C Spohn, ‘The Effect of Evidence Factors and Victim Characteristics on Prosecutors’ Charging Decisions in Sexual Assault Cases’, *Justice Quarterly*, vol. 14, 1997, 501–524.

¹⁴ D Beichner and C Spohn, ‘Modeling the Effects of Victim Behavior and Moral Character on Prosecutors’ Charging Decisions in Sexual Assault Cases’, *Violence and Victims*, vol. 27, 2012, 3–24; Spohn, Beichner and Davis-Frenzel, 2001.

charging practices, by only bringing criminal charges where there is evidence of guilt beyond a reasonable doubt, and they are also a common measure of occupational success.¹⁵ Research on prosecutorial decision making suggests prosecutors employ a ‘downstream orientation’, where they anticipate or predict how juries will interpret and respond to a case, when making decisions about whether or not to pursue prosecution.¹⁶ The goal for reducing uncertainty is the likelihood of achieving a conviction *at a jury trial*, despite the fact that a majority of criminal cases are disposed of through a plea agreement. Research suggests that prosecutors’ assessments of whether cases are likely to result in a conviction are primarily based on legally relevant factors, such as the strength of the evidence against the accused.¹⁷ Other studies find that extra-legal factors such as suspect and victim characteristics and the victim’s relationship to the suspect also influence the decision to prosecute a case.¹⁸ Because prosecutors rarely have all of the information they need to make informed, rational decisions, they establish formal and informal case processing norms intended to absorb uncertainty by imposing a rationality on the decision making process.¹⁹ For example, court workgroup members such as prosecutors, defence attorneys and judges establish recognised ‘going rates’, or informal norms concerning routine charges, plea agreements and punishment for criminal offences that are familiar to the court. Nardulli et al. (1988) uses the term ‘consensus mode’ to describe those cases where workgroup members apply

¹⁵ A J Davis, ‘The American Prosecutor: Independence, power, and the threat of tyranny’, *Iona Law Review*, vol. 86, 2001, 393–466; D S Medwed, ‘The Zeal Deal: Prosecutorial resistance to post-conviction claims of innocence’, *Boston University Law Review*, vol. 34, 2004, 125–183.

¹⁶ L Frohmann, ‘Convictability and Discordant Locales: Reproducing race, class and gender ideologies in prosecutorial decisionmaking’, *Law and Society Review*, vol. 31, 1997, 531–556.

¹⁷ Albonetti, 1987, finds that cases resulting in arrests and criminal charges were more likely to involve the presence of a weapon, the use of force, and severe victim injuries. Other legal factors unrelated to incident severity have still been shown to impact case outcomes. For example, both Albonetti, 1987, and L Mather, ‘Comments on the History of Plea Bargaining’, *Law and Society Review*, vol. 13, 1979, 281–285, found that defendants with a criminal history are more likely to be prosecuted. J Schmidt and E Steury, ‘Prosecutorial Discretion in Filing Charges in Domestic Violence Cases’, *Criminology*, vol. 27, 1989, 487–510, find that offenders with a failure to appear in court are also more likely to be prosecuted.

¹⁸ C Albonetti, 1987; Beichner and Spohn 2012; D Hirschel and I Hutchison, ‘The Relative Effects of Offense, Offender, and Victim Variables on the Decision to Prosecute Domestic Violence Cases’, *Violence Against Women*, vol. 7, 2001, 46–59; T Schlesinger, ‘Racial and Ethnic Disparity in Pretrial Criminal Processing’, *Justice Quarterly*, vol. 22, 2005, 70–92; Spohn, Beichner, and Davis-Frenzel, 2001.

¹⁹ J Eisenstein and H Jacob, *Felony Justice: An organizational analysis of criminal courts*, Little Brown, Boston, MA, 1974; J Eisenstein, R Flemming and P Nardulli, *The Contours of Justice: Communities and their courts*, Little Brown: Boston, MA, 1988; see also: J Dixon, ‘The Organizational Context of Criminal Sentencing’, *American Journal of Sociology*, vol. 100, 1995, 1157–1198.

going rates easily to facilitate decision making because the case is routine and well understood by all participants.²⁰ These cases are likely to end in pleas. When faced with criminal charges with less well established going rates, consensus commonly breaks down, pleas fail and trials are more likely. In these less established cases, even when there may be sufficient evidence to pursue prosecution, prosecutors may dismiss charges if they lack established going rates that would normally facilitate pleas, have concerns about how jury members will perceive victims or witnesses, or in the case of new crimes like human trafficking, concerns about the legitimacy of the offence itself. There are also practical conditions necessary to secure a conviction, particularly the cooperation of victims. Research confirms the importance of victim willingness to cooperate in the prosecution and victim credibility in prosecutor decisions to pursue charges in sensitive crime cases.²¹

Human trafficking provides a unique opportunity to examine the process of uncertainty avoidance in an area of law where evidentiary burdens are less established due to the relatively new nature of the legal reform. Because human trafficking at the state level is new, prosecutors are less likely to have had experience prosecuting these types of cases and are therefore less likely to be able to predict how a judge or jury would interpret the evidence or perceive the victims.²²

²⁰ P Nardulli, J Eisenstein and R Flemming, *The Tenor of Justice: Criminal courts and guilty plea process*, University of Illinois Press, Chicago, IL, 1988. These findings have been confirmed in further empirical examination; see: R Farrell and M Holmes, 'The Social and Cognitive Structure of Legal Decision Making', *The Sociological Quarterly*, vol. 32, 1991, 529–542; J T Ulmer, *Social Worlds of Sentencing: Court communities under sentencing guidelines*, State University Press, Albany, NY, 1997.

²¹ C Albonetti, 'Criminality, Prosecutorial Screening and Uncertainty: Toward a theory of discretionary decision making in felony case processing', *Criminology*, vol. 24, 1986, 623–644; M Dawson and R Dinovitzer, 'Victim Cooperation and the Prosecution of Domestic Violence in a Specialized Court', *Justice Quarterly*, vol. 18, 2001, 593–622; G LaFree, 'Official Reactions to Social Problems: Police decisions in sexual assault cases', *Social Problems*, vol. 28, 1981, 582–594; J Spears and C Spohn, 1997. Prosecutors in sexual assault cases question the credibility of victims and potential witnesses against a standard of a typical credible victim. See: Frohmann, 1997; L Frohmann, 'Discrediting Victims' Allegations of Sexual Assault: Prosecutorial accounts of case rejection', *Social Problems*, vol. 38, 1991, 213–226.

²² Similarly, with hate crimes, prosecutors decided to prosecute crimes under hate crime legislation when they felt more confident 'decreasing the complexity of a case' and 'minimizing risk' of a not guilty verdict. See: B McPhail and V Jenness, 'To Charge or Not to Charge? That is the Question: The pursuit of strategic advantage in prosecutorial decision-making surrounding hate crime', *Journal of Hate Studies*, vol. 4, 2005, 89–119.

Methods and Measurement

Sources of Data

The data used in this study was collected as part of a larger project examining human trafficking prosecutions in a targeted sample of US counties.²³ Many human trafficking cases cannot be prosecuted at the federal level due to jurisdictional limitations and time and resource constraints. In the US, state prosecutions are becoming more common and are projected to make up the majority of human trafficking prosecutions in the coming years.²⁴ We reviewed the closed case records of human trafficking investigations conducted by law enforcement in 12 sampled counties and conducted 166 in-depth interviews with police, prosecutors, victim service providers and court officials involved in the investigation and prosecution of these cases. The interviews were intended to illuminate the process of investigating and preparing human trafficking cases for state-level prosecution.

Because relatively few local law enforcement agencies have investigated human trafficking cases, randomly selecting counties would have yielded sites that did not have the caseload and experience necessary to inform our research. Instead, we used a multi-stage cluster sampling approach where we first identified US counties where there was evidence that the police had investigated cases of human trafficking since the passage of the TVPA in 2000. We then grouped counties by state legislative characteristics and selected a targeted sample of twelve counties that varied by legislation (no state human trafficking law, basic state human trafficking law and comprehensive state human trafficking law).²⁵ Two hundred and fifty-four (254) human trafficking cases were identified across the study sites.²⁶ We drew a sample of approximately 15 cases per site that were stratified by year (2003-2010) and type of trafficking (sex trafficking adult, sex trafficking minor, labour trafficking, and sex and labour trafficking combined). The present analysis focusses on the 150 suspects that were arrested by state and municipal law enforcement

²³ A Farrell, J McDevitt, R Pfeffer, S Fahy, C Owens, M Dank and W Adams, 'Final Report: Identifying challenges to improve the investigation and prosecution of state and local human trafficking cases (NCJ-238795)', Washington, DC: United States Department of Justice, National Institute of Justice (peer reviewed), 2012.

²⁴ See: V. Bouche et al., 2015.

²⁵ It is possible for human trafficking cases to be investigated and prosecuted as other types of crime (e.g. promotion of prostitution). Cases involving human trafficking acts were identified in states without state laws defining human trafficking as a stand-alone crime. In those cases, perpetrators of human trafficking were prosecuted for other types of offences.

²⁶ This included all of the investigations of human trafficking that had been opened and closed between the passage of the first state human trafficking laws (2003) and the beginning of data collection in 2010.

across our sampled cases to understand the factors that predict state prosecution. We coded detailed information about the characteristics of each studied case from police incident reports, investigative records, indictments and charging documents, court testimony records, and sentencing opinions.

Variables and Measurement

We examine three charge outcomes for each studied suspect: charges declined, charged with a human trafficking offence, or charged with another criminal offence. Outcomes were coded as 1 when charges were filed for a measured violation. See Table 1 for a complete list of all dependent and independent variables in this study. A majority of the state-level cases with identified human trafficking perpetrators were charged with offences other than human trafficking. Only 22% of the state-level cases with identified human trafficking perpetrators were charged with a state-level human trafficking offence (see Table 2). All of the suspects in our sample who were charged with a state human trafficking offence were sex trafficking offenders.²⁷ Thirty-seven per cent (37%) of suspects were charged with promotion/compelling prostitution offences and an additional 16% of suspects were charged with prostitution offences.²⁸ Eleven per cent (11%) were charged with sexual offences such as sexual assault or sexual exploitation of a child. The remaining suspects were charged with other types of offences including conspiracy, kidnapping, and drug offences.

Empirical research suggests that the likelihood of prosecution increases with the existence of evidence supporting the prosecution, including physical, demonstrative, (e.g., photos, '911' emergency call tapes, medical reports) and digital evidence (e.g., emails, ATM transactions) that corroborates victim testimony or independently furthers the prosecution's case.²⁹ Additionally, prosecutors take into account the amount of evidence and the number of witnesses as well as the existence and willingness of a victim to cooperate with the prosecution. To capture information about the strength of the case we include a measure of whether the police collected physical, demonstrative, or digital evidence (coded 0 for no evidence collected and 1 for any physical, demonstrative or digital evidence). We also measured victim cooperation by

²⁷ Despite the fact that all suspects charged with human trafficking offences were engaged in sex trafficking, we continue to use the umbrella term of human trafficking because state criminal codes varied in their classification of human trafficking crimes with some specifying separate sex and labour trafficking offences and others including sex and labour trafficking acts under a generic human trafficking offence.

²⁸ Prostitution offences included prostitution or solicitation of prostitution, common night walking enticing a person for prostitution, keeping a house of prostitution, and living off the earnings of prostitution. The parties to such crimes can include a sex worker, customer and/or facilitator.

²⁹ See: Albonetti, 1987.

whether or not a victim was interviewed and provided information to the police and prosecutors (coded 0 for no and 1 for yes). The data coding mechanisms employed to capture the quality of evidence were simplistic. Although necessary for an exploratory study where coding structures for the quality and quantity of these complex events have not been developed, dichotomous variables are not able to capture variation that likely exists in the quality of victim cooperation or the content of victim interviews.

Additionally, we coded for indicators of the means of human trafficking as specified in the TVPA and the reauthorisations of 2003, 2005, and 2008 to further operationalise the strength of a human trafficking case. Human trafficking indicators included: threatened or actual physical or non-physical harm, use or threatened use of law to exert pressure, demeaning or demoralising the victim, disorienting victims (e.g. isolation, restrict communication), diminishing resistance and debilitating (e.g. denying food, water, medical care, weakening with drugs or alcohol), deceiving (e.g. overstate risks of leaving and/or rewards of staying), dominating, intimidating and controlling (e.g. displaying weapons, rules and punishments), knowingly recruited, enticed, harboured, transported, provided, obtained, or maintained a person for purposes of commercial sex, knowingly benefited from participating in human trafficking, knew [or recklessly disregarded] that force, fraud, or coercion would be used to cause the person to engage in commercial sex. We used the force, fraud and coercion means framework from the TVPA because all states of the sites we studied used the TVPA as the basis for their own legislation. This coding allows us to measure the strength of a case across different states' unique legislation and elements. Evidence of human trafficking is coded as a count of the number of these human trafficking indicators identified in the case review, ranging from 0 to 10. Multiple elements, resulting in a higher value, suggest a stronger case. Modelling was conducted to control for the effect of a case being adjudicated in a particular state since state statutory definitions of human trafficking varied across study sites.

We examine characteristics of both the victim(s) and suspect(s) to determine the degree to which extra-legal factors influence prosecutor charging decisions in state human trafficking cases. Qualitative research suggests that prosecutors are more likely to bring charges in human trafficking cases involving minor victims because these victims are perceived as needing more protection.³⁰ Additionally, under federal law and many state laws, the evidentiary burden of proving human trafficking is reduced when the victim is a minor (for example,

³⁰ See: Clawson et al., 2008.

under federal law there is an exception to the force, fraud or coercion requirement for minor victims). Thus, we measure whether any of the victims in the state-level cases are minors (coded 0 for only victims who are 18 or over and 1 for at least one victim under 18). We further measure whether the victim(s) are female, male, or whether the case involves both male and female victims.³¹ We also measure whether the case involved no victims, a single victim, or multiple victims (each coded as 0 for no and 1 for yes).³² In addition to information about victims, we measure the influence of suspect race, coded as White, Black, Hispanic, Asian or other, and suspect age (coded as 0 if under 30 and 1 if 30 and above).³³ We include a variable for missing data for suspect race and age to capture the effect of cases where this information was not available.

There is significant debate about the value or harm of arresting human trafficking victims. Since human trafficking victims often engage in illegal activity such as prostitution or illicit immigration during the course of their victimisation, law enforcement can use the power of arrest or detention to secure victims. Victim detention may occur because law enforcement does not recognise individuals as crime victims or because they do recognise their victimisation but utilise arrest as a mechanism to protect victims from retribution, and coerce their cooperation with ongoing investigations. Potential victims were arrested in nearly one-third of the cases analysed for this study. Many of these victims were initially identified as an offender rather than a victim. Though concerning, this finding is not surprising considering that units that commonly uncover sex trafficking, such as vice units, are generally tasked with making prostitution arrests. To determine whether arresting human trafficking victims promotes or hinders prosecution of human trafficking suspects, we measure victim arrest as whether or not any identified victim was arrested during the course of the investigation into a human trafficking offence (coded as 0 for no and 1 for yes).

³¹ We coded for transgender victims, but none were identified in the study cases.

³² Victim cooperation in many cases is more complicated than a dichotomous indication of no cooperation versus some cooperation. Additionally, cooperation is not static. Victims sometimes cooperated and provided full information at one point in the investigation only to disappear or recant their statements at later points. Unfortunately, we could not code for these complexities in a reliable way. Instead, we coded for indications in the case record that a victim was at any point in the process willing to cooperate and provide information to law enforcement and prosecutors compared to those cases where no victim was identified or willing to provide information. Future research is needed to explore how various forms or degrees of cooperation impact the decision making processes of prosecutors in human trafficking cases.

³³ The average age of suspects is 33. However, suspect age is not normally distributed. To address skewed distributions, we created a dummy variable separating young (under 30) and older (30 and above) suspects.

Analytic Strategy

Multinomial logistic regression models are estimated to test the impact of various legal and extralegal factors on a polytomous outcome measure of whether a state human trafficking offender had all charges dismissed (coded 0), was charged with another type of crime (coded 1) or was charged with a human trafficking offence (coded 2). There were 150 cases with state charges (N=150). Multinomial regression is utilised here to explain the odds of a defendant having charges dismissed, being charged with a non-trafficking offence or being charged with a trafficking offense when specific conditions are present (e.g., victim who is a minor victim is arrested). We address the issue of non-independence related to multiple subjects being charged in the same case by using the ‘cluster-robust standard error’ option in Stata software, specifying the criminal case as a ‘cluster’ (a robust treatment of errors). This option adjusts the standard errors for all predictors to where they should be (without applying this adjustment, standard errors will be understated, thus leading, in some instances, to seemingly statistically significant findings that are actually not significant). In addition to correcting for case-level effects, we account for county-level effects, a second source of non-independence in our models, by including county-level dummy variables for each county.³⁴

Data from qualitative interviews was transcribed and uploaded to the software programme NVivo10 for coding and analysis. We developed a series of thematic codes to better understand the challenges state prosecutors faced in pursuing criminal charges against human trafficking offenders. Common themes about prosecution from the qualitative analysis are explored here to better understand and contextualise findings from the case analyses.

Results

To understand how legal and extra-legal factors influence the prosecution of state human trafficking cases a series of multinomial regression models are estimated. Table 3 presents findings from the multinomial regression models estimating whether suspects were not charged (reference category), charged

³⁴ A key prerequisite of conducting multivariate modelling and associated statistical tests is that observations be independent of one another (i.e., standard errors of predictors must be independently distributed). When that assumption is violated, errors will be correlated at the group level. We encounter two such sources of non-independence in the current research. In criminal cases that contain multiple defendants, outcomes for individuals within those cases will be related (and therefore, not independent). Cases in the same county are also not independent. Counties have characteristics, attributes, and cultural norms inherent in their criminal justice process that could influence outcomes for individual defendants.

with another type of crime, or charged with a human trafficking offence for *state-level* cases.

Table 3: Multinomial Regression Predicting State Prosecution (n=150)

	Other Offense	Human trafficking
	B/(SE)	B/(SE)
Human trafficking indicators	-1.97** (0.96)	-3.94 (3.99)
Evidence	1.99* (0.86)	2.80** (0.94)
Victim cooperation	0.27 (0.76)	1.96 (2.34)
Multiple victims	-1.26 (0.90)	-0.65 (1.11)
Victim arrested	2.95** (0.98)	20.77** (1.52)
Minor victim	1.066 (0.88)	0.90 (0.87)
Female victim	-0.43 (0.87)	31.67** (1.86)
Suspect Black	-1.23 (0.83)	-0.93 (0.78)
Suspect Hispanic	-1.82 (1.75)	-0.51 (1.48)
Suspect Asian	-1.34 (1.70)	-16.98** (1.36)
Suspect race missing	-1.83* (1.05)	15.45** (1.33)
Suspect over 30	-0.01 (0.36)	-0.03 (0.29)
Suspect age missing	-1.39 (0.86)	-16.79** (1.48)
Intercept	0.22 (2.49)	-51.06 (5.01)
R-Square	.318	

* $p < 0.05$; ** $p < 0.01$

Reference category is no prosecution

Note: county clustered only

Human Trafficking Indicators

In the state-level human trafficking cases we studied, evidence of indicators of legal elements of human trafficking was not significantly associated with filing human trafficking charges. Further, somewhat surprisingly, when cases included more indicators of human trafficking elements, they were significantly less likely to result in the filing of other types of criminal charges as well. Because trafficking laws are difficult to navigate and require evidence that prosecutors and the police are often not used to obtaining, prosecutors may shy away from prosecuting cases that present with human trafficking indicators. A detective in one study site explained the reluctance of the state prosecutor in his district to charge human trafficking crimes: ‘The trafficking law hasn’t been used that much, so, as a prosecutor, you don’t want to be the only one using it, and all of a sudden your case doesn’t go forward.’ Interviews with state prosecutors confirmed they were generally unfamiliar with human trafficking laws and struggled to define the concept of human trafficking beyond the prostitution of minors (just one of the legal elements of trafficking). Labour trafficking cases were particularly challenging for state prosecutors because some states defined labour trafficking offences separately from sex trafficking offences of adults, and required different legal elements for these crimes, particularly with minor victims.

Despite these challenges, state prosecutors who took the time to look into the details of a particular human trafficking case describe being moved by the incredible level of violence and coercion involved. In some cases, these facts prompted prosecutors to pursue human trafficking charges despite known impediments. The prosecutors we spoke with were often the first in their state to prosecute a case using state anti-trafficking laws. One prosecutor describes how she happened upon the state human trafficking offence and decided to pursue the charge.

I started bouncing the case around with a few colleagues and I’ll be completely honest and I’m embarrassed to say it, but none of us were really aware of the state human trafficking law. It was pretty new at the time...once I read through it, I was like, ‘this human trafficking offense is perfect.’ I mean, it’s exactly what it is.

Prosecutors who charged human trafficking suspects using untested state laws were often met with challenges when trying to explain and prove the facts of the new crime to judges and juries. Many state and local prosecutors were operating on their own with little to no source of legal guidance they could

refer to for topics such as prosecutorial techniques, how to handle common defence tactics, or sample jury instructions. In every site, when prosecutors who took human trafficking cases to trial using state anti-trafficking laws were asked where they went for guidance on jury instructions, they said that they created them themselves and had wished they had a resource or fellow state prosecutors to consult.

The Presence of Evidence

Suspects were more likely to be charged with either a human trafficking offence or other types of charges when the case had physical, demonstrative, or digital evidence. This finding is consistent with previous research on other crimes suggesting that prosecutors are more likely to file charges when the evidence strongly supports conviction.³⁵ This is to be expected. However, despite the importance of evidence, roughly a third of the cases we reviewed had no evidence supporting victim testimony. A state prosecutor describes the challenges of pursuing trafficking charges when cases lack corroborating evidence.

The evidence in the end just wasn't strong. Probably because there were a lot of inconsistencies with the victim's statements and us not being able to prove the case beyond a reasonable doubt to a jury. Typically it would be the case that a victim gave an initial statement and as the investigation progresses that statement becomes something that we can't corroborate with other evidence and you need more than just one person saying this is what happened. Other witnesses that will corroborate the event are gone or not credible, so you have to weigh the credibility of all the witnesses that will be testifying to see if a jury is going to believe them or not, and that consists of their background, their criminal histories, their age, their relationship to the parties, you know whether they have a stake in the outcome of the case, things like that.

This quote illustrates the 'downstream orientation', where the prosecutor evaluates evidence based on how he or she believes it will be received by judges and juries. The need for substantial evidence of trafficking such as hotel receipts,

³⁵ See: Albonetti, 1986; Frohmann, 1997; and Spohn, Beichner and Davis-Frenzel, 2001.

photographs of injuries, Backpage/Craigslist advertisements, phone and text message records and financial records was a recurring theme in many of the interviews with police and prosecutors, even if there was a victim or witness willing to cooperate and testify in court. Prosecutors complained that they were not being referred cases with strong evidence. In most of the cases we reviewed, prosecutors did not get involved with an investigation until a suspect was arrested. When evidence from the original investigation was lacking, prosecutors sometimes sent the police back out into the field to collect additional evidence, but physical records and corroborating witnesses were often difficult to locate after some time had passed.

In addition to improving the likelihood that cases would result in a conviction based on their own weight, prosecutors suggested that physical or corroborating evidence also improved the likelihood that the victim/witness would actually testify. One prosecutor expressed concern about a victim failing to appear to testify at trial when her testimony was the main source of evidence. ‘We’re always looking for corroborative evidence, so that we’re taking the burden off of the victim.’ When physical or corroborating evidence is hard to come by, the case ends up resting on the believability of the victim.

Victim Cooperation and Credibility

Previous research on prosecution of sexual assault and domestic violence cases suggests that victim cooperation is strongly associated with the decision to pursue prosecution.³⁶ When we included a measure of victim arrest, victim cooperation did not statistically predict the decision to pursue state charges in human trafficking cases. As described in more detail below, arresting victims appears to be a mechanism that law enforcement uses to secure victim cooperation. Despite the failure of victim cooperation to independently predict prosecution, in nearly every study site, prosecutors and police who were interviewed cited lack of victim cooperation as the biggest barrier to prosecution. For example, a police officer in a human trafficking unit described the challenge of moving a case forward to prosecution when a victim could not be located or was not willing to cooperate with law enforcement.

A domestic victim without a cell phone or way of contacting them, they’re like gypsies. They move all over the place. Sometimes they go back

³⁶ Dawson and Dinovitzer, 2001; Spohn, Beichner and Davis-Frenzel, 2001.

home. Sometimes they run away again, they end up hooking up with some other trafficker. We end up with a whole different case, with a different exploiter because they hooked up with another exploiter. Or, they go back to their original exploiter. Victim cooperation is our biggest stumbling block.

In some sites, prosecutors acknowledged having knowledge about other victims in the community who were victims in cases that went forward to prosecution. These victims either refused to cooperate with law enforcement or provided initial statements and then refused to follow up with prosecutor requests for interviews.

Although the quantitative data from cases did not support interviewees' statements about the importance of victim cooperation, we found that the arrest of a victim positively and significantly predicted the filing of both human trafficking and other crimes in state human trafficking cases. In state-level cases, law enforcement may actually be using arrest to coerce victims' cooperation. Victims were arrested in 59% of all state-level cases. As described above, all of the human trafficking charges studied here involved acts of sex trafficking. Thus it is not surprising that when human trafficking victims were arrested, the arrest was for a prostitution-related offence. In some cases, the charges were dropped against a victim when they provided information to law enforcement about their trafficker. Despite concern that juries may find victims who faced criminal charges to be less credible witnesses, human trafficking cases were more likely to be prosecuted when the victim was arrested in the sites we studied.

The influence of victims being arrested on state prosecution decisions was supported by data from qualitative interviews. In particular, police indicated that they often had to arrest sex trafficking victims because there was not a safe and secure place to house victims, particularly minors. They described victims as 'evidence' that needed to be secured and stabilised. The victim services provision most often cited by prosecutors was secure, specialised and long-term housing for domestic minor victims of trafficking. If shelter was available at all, it usually consisted of a youth shelter or shelter for victims of domestic violence that was unsecured. Much more often, victims were arrested or sent to juvenile detention as a mechanism to keep them in a secure facility long enough to get them to cooperate.

Law enforcement officials explained that arresting victims was necessary to get them to ‘flip’ and provide information that could lead to successful prosecution of pimps and other individuals who may be part of a larger trafficking network. As one prosecutor explained, ‘You can’t get there [a trafficking charge] without breaking a few eggs...at some point in time you’ve got to be willing to charge some of these girls with prostitution, or charge some people at a lower level to move up.’ Despite the advantages of securing victims in locked facilities identified by prosecutors, the subjects we interviewed were knowledgeable and concerned about the potential for arrest or detention resulting in long-term victim harm.

In line with research on prosecutorial charging decisions for other sensitive crimes, we found numerous ‘extralegal sources of uncertainty’³⁷ that reduced the likelihood of a human trafficking charge. For example, charges were generally more common in cases involving female victims. Contrary to the expectation from the literature and the fact that under federal law and across most states minor sex trafficking cases do not require prosecutors to prove force, fraud or coercion, we did not find a statistically significant effect of minor victims on the likelihood of prosecution for state human trafficking crimes or other crimes. Suspect race and adult age had little relationship to prosecution decisions after controlling for important legal factors.³⁸

Discussion and Conclusions

This research provides a preliminary, exploratory examination of how state human trafficking offences are being charged in a sample of US counties. Although many of the findings will not surprise prosecutors who are familiar with human trafficking, they provide some empirical support for a host of concerns reported through anecdotal accounts. One of the most notable findings was the fact that state prosecutors utilised human trafficking charges in only one-fifth of the human trafficking cases reviewed. Instead, a majority of human trafficking perpetrators were charged with state promotion or compelling of prostitution offences or prostitution offences. Prosecutors interviewed for this study were often the first in their state to prosecute a

³⁷ Albonetti, 1987, p. 311.

³⁸ Research on prosecutor decision making for other crimes suggests that victim race is an important factor in predicting prosecutor decisions to take cases forward to prosecution (see: Spears and Spohn, 1997, Davis, 1998, Frohmann, 1997). We could not reliably measure race of the victim because this information was often missing from police reports or prosecutor records.

human trafficking case using state anti-trafficking laws. State and local prosecutors were often operating on their own with little or no source of legal guidance. We also found that many state prosecutors are unaware of their own state's human trafficking laws. Further, no state prosecutors in our sample charged a case with labour trafficking. These findings suggest more work is needed to educate state and county prosecutors about human trafficking laws and how to utilise them effectively. Training to support prosecutors in successfully developing cases to charge offenders with new human trafficking offences is critical to the effective implementation of these new laws. Training should include information about state human trafficking statutes including summaries of human trafficking case law and legal strategies that have been effective in securing prosecutions in other jurisdictions.

Although human trafficking is a new crime, this exploratory study identified many parallels between charging decisions in these new types of cases and patterns of charging that have been established in other types of crimes. For example, legal factors, particularly the existence of evidence, are critical to explaining variation in prosecutor decisions to pursue criminal charges. There are also important ways that human trafficking cases are distinct from other crimes. For example, victim cooperation is not independently associated with prosecutors' charging decisions in this sample of human trafficking cases, as it is in numerous studies of sexual assault and domestic violence cases. It is possible that victim cooperation alone was insufficient to bringing human trafficking cases in the absence of strong corroborating evidence. Interviews with prosecutors confirmed the need for advanced law enforcement training to foster gathering the type of evidence necessary to support human trafficking prosecutions. It is also possible that the positive impact of victim cooperation is lost in the basic, dichotomous coding scheme where a case was classified as having victim cooperation or not. Victim cooperation is varied and changes over the course of a criminal prosecution. Further research is needed to refine the collection of information regarding the quality and depth of victim cooperation. The present research did confirm that securing or, even more problematically, coercing a victim's cooperation through arrest or threat of an arrest is a primary driver of state-level human trafficking prosecution. This finding is problematic because detaining victims can re-traumatise and further harm vulnerable victims. Victims need both short and long-term shelter that will keep them safe from retaliation from their traffickers and provide them opportunity to meet their own restoration needs. Because traditional housing strategies for victims such as group shelters or residential placements may be ineffective for meeting the needs of human trafficking victims and keeping

them safe, police often rely on arrest and other less favourable forms of housing, such as secured detention in treatment facilities in an attempt to secure victims. Contrary to our expectations, indicators of human trafficking did not predict charging of human trafficking offences. In other words, the apparent strength of the case relative to the elements of the offence that must be proven did not seem to influence whether or not trafficking charges were filed. Additionally, prosecutors were less likely to file other, lower criminal charges such as pimping or promotion of prostitution when cases contained more indicators of human trafficking. It may be the case that evidence of human trafficking actually disrupts the established calculations of the likelihood of conviction that prosecutors utilise when deciding whether to prosecute a case. These findings support the notion that when faced with uncertainty prosecutors are reluctant to utilise new human trafficking laws.

The existence of physical and corroborating evidence strongly predicted prosecution in the studied human trafficking cases. Human trafficking cases necessitate the acquisition of corroborating evidence to help support a victim's statements at trial. However, this examination also highlighted that almost one-third of cases did not have physical or corroborating evidence. Absent strong corroborating evidence, prosecutors may be forced to abandon prosecution or agree to a plea to a lower-level offence, which will spare vulnerable victims from the pain of testifying. Acquiring this important corroborating evidence necessitates training law enforcement in human trafficking investigative techniques (which may differ significantly from the investigative routines of traditional vice units), proactive collaboration between the police and prosecutor to guide the collection of evidence necessary for prosecution, and the allocation of resources to support investigations.

The deficiencies in physical and corroborating evidence necessitate better support and preparing of victims, as their testimony, inevitably critical to a prosecution, is even more important when physical and corroborating evidence is unavailable. Once they have identified victims, police, prosecutors, and victim service providers should commit to long-term support for them. Required services include health, mental health, education, job training, and most importantly secure housing. Since human trafficking prosecutions are often very lengthy, a corresponding long-term victim support plan will increase participation of victims as witnesses and, thereby, the number of successful prosecutions. Even with improved victim support, prosecutors recounted serious challenges to securing credible victim testimony that may be endemic to the human trafficking victimisation experience. These limitations necessitate training prosecutors about the impact of trauma and violence on victim

behaviour, and providing techniques for presenting evidence at trial, even with a victim who may be perceived as less than fully credible.

This article's goal was to preliminarily examine factors that influence charging decisions in state human trafficking cases. The conclusions of this study highlight future research avenues. Although we found that cases with more indicators of human trafficking did not increase the likelihood of prosecution, future research should investigate states individually, specifically utilising elements that vary between states' human trafficking statutes, to see if there are differences to this trend among states. This can further show if specific state legislative provisions foster charging human trafficking offenders with specific criminal offences. Further, an individual state analysis would also help with some of the limitations of this large, exploratory study, allowing a researcher to examine variables like strength of evidence in greater depth with a smaller sample of cases.

This study also found, unsurprisingly, that charges were more likely to occur when there was evidence to support victim testimony. Future research should take this examination one step further and examine what evidence in particular lead to successful convictions, allowing practitioners to orient themselves and investigations to gather that type of evidence. We also found that victims of human trafficking are frequently arrested, and this arrest is associated with prosecution of human trafficking of the offender. Future research should also examine what happens after a victim is arrested. For example, are charges dropped in exchange for testimony as qualitative interviews suggest? Are victims cared for by a victim services provider following arrest? Further, we have posited that the high percentage of victim arrests has occurred because victims are initially being identified as offenders rather than victims, but future research should again go further and confirm if these victims were prosecuted and, if so, with what law they were prosecuted.

There are many challenges to the successful prosecution of new human trafficking crimes. As state and county prosecutors become more adept at bringing human trafficking cases forward to prosecution and as states affirm human trafficking convictions through the appeals process, we should expect to see routines developed that support the prosecution of human trafficking cases. Additionally, state laws have improved significantly since the first generation of human trafficking prosecutions. Many states have amended their trafficking laws to provide state prosecutors with the legal and procedural tools needed to prosecute human trafficking cases such as lower burdens of proof, safe harbour provisions and restitution. Additionally, states have expanded training for law enforcement and mandated statewide task forces to

hold those responsible for enforcing new trafficking laws accountable. Although human trafficking cases may continue to frustrate prosecutors because of the many challenges endemic to this particularly nefarious crime, proper support and training, established case processing routines, and experience in prosecuting these new crimes will decrease the conditions of uncertainty that impede human trafficking and facilitate justice being served for victims.

Table 1: Descriptive Statistics of Dependent and Independent Measures (n=150)

Outcome Variables	N	%/ Mean	SD	Range
State Charge Type				
None	51	34.0		
Other	77	51.3		
Human Trafficking	22	14.7		
Independent Variables				
<i>Legal Variables</i>				
Evidence	103	68.0		
Human Trafficking Indicators	150	3.91	3.24	0-10
<i>Instrumental Variables</i>				
Victim Cooperation	88	58.7		
Multiple Victims	55	36.7		
Victim Arrested	88	58.7		
No Victim	27	8.2		
<i>Extra-legal Variables</i>				
Minor Victim	79	52.7		
Victim Gender				
Male Victim/Multi-gender	37	24.7		
Female Victim	113	75.3		
Suspect Race				
White	31	20.7		
Black	67	44.7		
Hispanic	27	18.0		
Asian	20	13.3		
Suspect Race Missing	5	3.0		
Suspect Age				
Under 30	75	50.0		
30 and over	68	45.3		
Suspect Age Missing	7	4.7		

Table 2: Type of State Charges for Cases Involving Human Trafficking Suspects (n=99)

	N	%
Promoting/Compelling Prostitution	36	37%
Prostitution	16	16%
Human trafficking	22	22%
Conspiracy	3	3%
Sexual assault	6	6%
Sexual exploitation of a child	5	5%
Kidnapping	3	3%
Drugs	2	2%
Other	6	6%

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Trafficking of Women for Sexual Exploitation in Europe: Prosecution, trials and their impact

Biljana Meshkovska, Nikola Mickovski, Arjan E R Bos, Melissa Siegel

Abstract

The importance of criminal proceedings against traffickers in the fight against human trafficking is clear. However, this paper illustrates that investigations, prosecutions and trials are often extremely long with mixed influences on the victims themselves. The study draws on fieldwork conducted in five European countries: Albania, Bosnia Herzegovina, Bulgaria, Serbia and the Netherlands. A total of 40 interviews were conducted—with 7 trafficked persons and 33 service providers who are in direct contact with victims. Based on these interviews, some general themes were identified for analysis: (1) length of the criminal justice process, (2) secondary victimisation, (3) need for specialist training and interviewing skills for all individuals in contact with trafficked persons, (4) information and trust, (5) protection from intimidation, (6) not just conviction but financial compensation, and finally, (7) the label ‘victim’ and the wish to testify. Each theme is discussed in detail.

Keywords: sexual exploitation, criminal trials, compensation, Balkans

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Introduction

Often, according to the law it's possible, but in practice it's impossible.
—Police official, Serbia¹

The introduction of anti-trafficking legislation at international and national levels has been heralded by academics, politicians, lawmakers and practitioners alike as a major step forward in the fight against human trafficking. In fact, the definition of human trafficking, as presented in the *Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children* (from here on the Trafficking Protocol), is by itself already a major step forward in the fight against human trafficking. From 2000 when the Protocol was introduced, until the present day, legislation from the international level, using the definition as a starting point, has, in many countries, slowly trickled down to the national level and has thus given to people on the ground the tools to battle this phenomenon.

While an undeniable step forward, much remains to be done. In an attempt to evaluate the effectiveness of criminal justice responses to trafficking in the US, Farrell et al.,² gathered data from 140 cases of human trafficking in 12 US counties, and conducted interviews with individuals from law enforcement, prosecutorial bodies and service providers. They concluded that failures of state and federal authorities in the US to effectively prosecute trafficking cases is due to 'legal, institutional, and attitudinal challenges' when using anti-trafficking laws.³ Spohn places legislative reforms in regard to human trafficking in the same line as reforms that were introduced to improve prosecution and conviction rates in areas of sexual assault and domestic violence cases. These latter failed, as great emphasis is placed on the testimony of a 'genuine' victim, who is beyond any moral reproach as in human trafficking cases.⁴ Goodey looks at prosecution of trafficking cases in the European Union and notes

¹ Interview, Police official, Belgrade, 30 October 2014.

² A Farrell, C Owens and J McDevitt, 'New Laws but Few Cases: Understanding the challenges to the investigation and prosecution of human trafficking cases', *Crime Law and Social Change*, vol. 61, 2014, p. 139. See also this issue A Farrell, M J DeLateur, C Owens and S Fahy, 'The Prosecution of State-Level Human Trafficking Cases in the United States', *Anti-Trafficking Review*, issue 6, 2016, pp. 48–70, with analysis which estimates case factors that predict prosecutors' decisions to pursue criminal charges.

³ Farrell et al., 'New Laws but Few Cases: Understanding the challenges to the investigation and prosecution of human trafficking cases', p. 161.

⁴ C Spohn, 'The Non-prosecution of Human Trafficking Cases: An illustration of the challenges of implementing legal reforms', *Crime Law and Social Change*, vol. 61, 2014, p. 175.

inadequate witness protection programmes as a legislative limitation.⁵ Goodey goes further to recommend that traffickers should be prosecuted under legislation other than that specifically introduced for trafficking, for instance, for charges such as money laundering. Such prosecutions will also lessen the burden placed on the victim throughout these processes.

Thus, the following questions arise: what are some of the issues that come up when implementing human trafficking legislation in practice? What can we learn from the experience of the professionals in the field, and trafficked persons themselves? Finally, and most importantly, what can be done to increase the benefits of such laws for the victims, or at least to make sure that they are not harmed by the implementation? This paper will answer these questions, in the European context, by focussing on Albania, Bosnia Herzegovina, Bulgaria, Serbia and the Netherlands. The focus of this paper is on female trafficking for sexual exploitation as one of the most prevalent and severe types of trafficking in the noted countries.

Methodology

For the purpose of this paper, a selection of European countries was made on the basis of the progress they have made in introducing anti-trafficking legislation, as well as the prevalence of the issue of trafficking in the same locations. Countries from Eastern and Southeastern Europe (Albania, Bosnia Herzegovina, Bulgaria, Serbia) as well as Western Europe (the Netherlands) were selected. The countries chosen for the study are, with the exception of the Netherlands, principally countries of origin of victims. There were several reasons behind this aspect of the selection process. First, it is in countries of origin that victims and service providers are often most available for interview. Although trafficking cases may be identified in countries of destination, the trafficked person may often want to return to the country of origin immediately after identification. Additionally, the trafficker may also return to the country of origin, which may be his/her country of origin as well. Second, prosecutions—not least for internal trafficking—do take place in countries of origin. And third, as noted above, research to date has generally focussed on countries of destination, and thus, an overview of the same processes in countries of origin seems to be lacking.

⁵ J Goodey, 'Sex Trafficking in Women from Central and East European Countries: Promoting a victim-centered and woman-centered approach to criminal justice intervention', *Feminist Review*, no. 76, 2004, p. 6.

The main part of this paper focusses on the issues that arise when speaking to professionals in direct contact with victims, as well as those most intimately affected—the trafficked persons themselves. For this purpose, seven interviews with trafficked persons were conducted. Additionally, 33 interviews were conducted with service providers from the target countries (six from the Netherlands, nine from Albania, five from Bosnia Herzegovina, five from Bulgaria and eight from Serbia). These included programme managers, social workers, psychologists, psychotherapists, police officials, lawyers, directors of anti-trafficking NGOs, shelter coordinators and crisis hotline operators. Data was gathered through semi-structured interviews with follow up probes. Victims were asked if they have participated in the criminal proceedings against their trafficker, and what that meant for them. Victims were also asked about their life prior to the trafficking experience. They were asked to talk about the trafficking experience if they so wished, and finally, about their current situation. In regard to their current situation, victim respondents were asked about their economic standing, physical and psychological well-being as well as social life. Service providers were asked about their contact with victims, identification and needs from the initial period of communication until their last communication with victims, as well as what they consider successful and not so successful cases of recovery and reintegration. Within this process, service providers were asked for their view on the impact of criminal proceedings on the victims. Service providers were also asked about their and others' attitudes towards sex work and prostitution, as well as their personal feelings towards their job. All interviewees were asked if they would like to give additional comments on issues not mentioned or touched upon throughout the interview, but related to the topics of discussion. Conversations lasted from thirty minutes to two hours, and were held at offices, cafes or private homes depending on the wishes of the interviewee. The interview protocols were reviewed and approved by the Ethics Committee of the Faculty of Psychology of Maastricht University. Respondents did not receive any payment for the granted interviews.

The analysis of the interviews has brought to the surface certain themes for analysis: (1) length of criminal justice process, (2) secondary victimisation, (3) specialist training and interviewing skills, (4) information and trust, (5) protection from intimidation, (6) not just conviction but financial compensation, and finally, (7) the label 'victim' and the wish to testify. These are discussed in detail below. They are issues related to criminal proceedings that, if addressed appropriately, can contribute towards the better recovery and reintegration of trafficking victims. Trafficking for the purpose of sexual exploitation is among the most severe types of trafficking, as well as a form of trafficking the impact of which service providers are most familiar with and

as such has been chosen as the main focus of this paper. As trafficking for the purpose of sexual exploitation predominantly affects women and girls, female victims of trafficking for sexual exploitation are the main target group of this research. Although men are also victims of trafficking for sexual exploitation, there can be significant gender based differences in experiences related to prosecution of the trafficker. Thus, focus on male victims is outside of the scope of this paper.

The Practice of the Law: The stories of trafficked women and service providers

Trafficked persons are the primary source of information when it comes to understanding the impact of criminal proceedings and of prosecution of traffickers on the identified victims themselves. Additionally, service providers that work with trafficked persons, such as lawyers, social workers, psychologists, psychiatrists, programme managers, crisis hotline operators, leaders of anti-trafficking NGOs, shelter coordinators as well as police officials, often have extensive experience and knowledge from which many lessons can be learnt. Professionals in the field are also a valuable source of recommendations: of what to do, what not to do, what works and what does not. Additionally, as the stories of trafficked persons contain many characteristics that are indicative of issues raised by practitioners in the field, each thematic section will begin with the re-telling of the personal experiences of the victims interviewed for this study.

Length of the Criminal Justice Process

Those trials were...come and go every time the government changed, the chief of the police was changed...We got really frustrated...ten years following the court...Tension ...The psychological tension was big...Such a psychological pressure. The guy, after ten years after changes of government and so on, he got the decision of court for seven years in prison, but it was never served. —Trafficked person, Albania⁶

⁶ Interview, Trafficked person, Albania, 29 November 2013.

Throughout the interviews with service providers from the Balkan countries, it was often mentioned that criminal proceedings against traffickers can last up to ten years. Various explanations for such a drawn-out timeframe were given, such as change of governments, change of judges and change of court. In certain cases, so much time has elapsed between the criminal and the civil procedure, through which victims ask for financial compensation, that, due to the short sentences imposed on traffickers (recruiters and exploiters, which in certain cases are the same person), the perpetrator is already out of jail and fails to appear for the civil procedure. It should also be noted that during the civil procedure for compensation (a procedure that must be initiated and funded by the victim), the burden of proof is on the victim, not the defendant. And civil proceedings—which effectively require everything to be done over again—may last just as long as the criminal procedure.

Although interviewees from the Netherlands also note that criminal investigations as well as criminal proceedings can last a long time, there is one stark difference between that country and the others studied in terms of the impact of such prolongation on the well-being of the victim: At the end of a trial in the Netherlands that results in conviction, victims will most likely be financially compensated as part of that process. In addition, foreign victims residing in the Netherlands for the duration of a trial that lasts beyond five years are entitled to request Dutch citizenship and thus are not compelled to return to their country of origin unless they desire to do so.

Secondary Victimization

I was a bit nervous, when they called me to the police to talk the first time. Whenever I see there is something from the police, I am afraid. I know that I shouldn't be afraid. I said, I'm afraid, I don't know why, maybe it's my habit...— Trafficked person, Bosnia Herzegovina⁷

Giving one detailed statement of the trafficking experience is a severely traumatic event for a trafficking victim. Unfortunately, it often happens that multiple statements must be provided throughout a long time period, each going into great detail.

A social worker from Serbia describes the atmosphere before a victim of trafficking has to testify in court:

⁷ Interview, Trafficked person, Bosnia Herzegovina, 1 October 2015.

We always try to go with them, to be their support, in case it's necessary, even if the psychologist prepares them for the testimony. Because they often feel a big fear, and are very upset, especially before the testimony, and it's important to be there for them, and to explain to them what the trial means, and what it may bring for them. Because of course there have been situations when they wanted to exit from all of that, to retreat, there are also cases when the trial has been postponed, because of the inability of the victim to face, not only the trafficker but to say what happened, in public, because of the big fear they feel. —Social worker, Serbia⁸

A psychologist, also from Serbia, notes the following about the criminal process:

This is very traumatic for women, because they have to again and again appear at the trial, to give statements, to meet the perpetrator. And that makes the recovery hard, and it brings back some of the traumatic experiences that she had, while she was trafficked. So, in that period, we have the most intensive communication with the women. After the end of the trial, then slowly, they also put a 'period' at the end of the experience. —Psychologist, Serbia⁹

This situation of telling and re-telling the trafficking experience in such detail is particularly troubling when taking into consideration that one of the ways in which women manage to move forward is through leaving the past behind. That aspect is captured well in the words of another psychologist:

When they come to the shelter, they say 'I want to change, and not mention again what has happened in the past.' —Social worker, Albania¹⁰

In fact, it is the practice of shelter staff interviewed throughout the countries studied to not ask anything about the past, and only work with what the women themselves decide to share. Victim testimonies during trials, in often intimidating and sometimes hostile court environments, can hinder the recovery and reintegration process of victims. A more friendly environment may be one in which the prosecutor is more familiar with the victim.

Some of the interviewed service providers mentioned the possibility of using video to provide testimony. However, it is also noted that even when this is available, it does not make a significant difference on the mental well-being of the victim.

⁸ Interview, Social worker, Belgrade, 10 October 2014.

⁹ Interview, Psychologist, Belgrade, 22 October 2014.

¹⁰ Interview, Social worker, Elbasan, 27 November 2013.

A Serbian police official interviewed for this paper emphasised that victim testimony was not their primary concern, but rather victim protection was:

We identify victims of trafficking independently of the acceptance to participate in criminal proceedings. We don't care about that, we don't care, if a victim is participating in trial, that is relevant to the prosecution. We want to protect the human rights of the victims of trafficking, and it's not important if that person has accepted to testify in criminal proceedings. – Police official, Serbia¹¹

A Dutch police official noted that there are different ways in which an investigation may be started and that not all involve an immediate statement from the victim.¹² When the investigation is initiated following a direct complaint by the victim, which may at some point translate into a testimony given in court, the police first check if the person is indeed a victim of human trafficking. If it is a case of human trafficking, the victim is given a 'reflection period' of up to three months, by which time she decides if she wants to press charges and testify against the traffickers.

In some instances, progression of the case may not require the victim to testify in court. Rather, the victim is invited to provide a 'witness statement' to the police or the court. According to the Dutch police interviewee, this is often 'less [hard] for the victim'. However, although the case may be initiated based on a 'witness statement', this may not be sufficient and the victim may still be invited by the judge to give a testimony in court.

There are also situations in the Netherlands where the investigation is initiated on the basis of an anonymous tip or information that is gathered through another investigation. In that regard an interviewee noted: "The legal system in Holland makes it possible to control the prostitution business, both legal and illegal. These kinds of controls also provide information with which you can start an investigation."

Victim testimony must, in any case, be supplemented by additional evidence. Primarily, according to a police official, the statement of the victim is always checked, to make sure it is truthful. In cases where victims arrive in the Netherlands by plane, passenger lists are checked. Internet, social media and cell phones are also checked for locations mentioned in the statement. Other

¹¹ Interview, Police official, Belgrade, 30 October 2014.

¹² Interview, Police official, Amsterdam, 4 November 2013.

persons who may be able to confirm the statement or investigation information are identified. Finally, as stated by the police official ‘we follow the money’. Calculation of the victim’s costs and pay benefits are made and double checked against administration documents in brothels. All additional evidence is important, and in cases where it is lacking, a decision often comes down to the statement of the victim against the statement of the suspect.

A Dutch lawyer¹³ and the police official quoted above,¹⁴ both emphasised that there are cases when the police do not want to ask the victim to testify at all. According to the police official:

Sometimes we see a victim who is so mentally unstable that we think her statement will not stand during investigation/trial. Sometimes because she is emotionally harmed but sometimes because of her mental capacities. We also evaluate these questions together with the social workers and psychiatrist if a statement will cause damage to her treatment/recovery. If necessary we will drop the case.

However, an exception may be made:

if there are more victims harmed or in danger by the same group/suspect...these are hard decisions as you will understand...sometimes it is a tactical decision: if we think a statement will reduce the chances of successful prosecution because a defense lawyer will be likely to cause doubt in a judge during interrogation.

Specialist Training and Interviewing Skills

They (the police) told me, you didn't do anything bad. These people did something bad, they are bad, don't go with them again. When I really saw what they did, I was sick, I wanted to hang myself, God saved me....I'm not afraid anymore. — Trafficked person, Bosnia Herzegovina¹⁵

The initial contacts with the victim after identification are crucial. It is in these times of fear and low trust that those in touch with the victim must take special care to assure victims that they are not to be blamed for what happened, that they are the ones whose rights have been violated.

¹³ Interview, Lawyer, Amsterdam, 14 March 2014.

¹⁴ Interview, Police official, Amsterdam, 4 November 2013.

¹⁵ Interview, Trafficked person, Bosnia Herzegovina, 1 October 2015.

Law enforcement officials interviewed for this study placed great emphasis on the need for specialist education and training of police, prosecutors and judges. A Dutch police official pointed out:

You need, to do that part of the job, you need extra certification, extra diploma. And in Holland, this training is 256 hours of study for the detectives, and within this course there are three exams, and one third of all the participants fail the exams. So, we are trying to raise quality in investigation of human trafficking. —Police official, Netherlands¹⁶

A police official from Serbia noted the following:

We in Serbia have a specialized police, working with human trafficking, sensitized about human trafficking issues...in 27 prosecutors offices, there are 27 contact points who have gone through the education. They are appointed by the state prosecutor, and are responsible about issues of human trafficking. Those prosecutors, have gone through three sessions of education. —Police official, Serbia¹⁷

However, not all professionals who come in contact with victims of trafficking have received such training. The head of a crisis centre in Sofia stated:

It's a huge difference, if the police official says, leave her, she is a whore, it's another thing if the police official treats them as victims. —Head of crisis centre, Sofia, Bulgaria¹⁸

A shelter coordinator from Albania pointed out that judges and prosecutors sometimes treat victims of trafficking as any other person who comes into their courtroom:

The judges and court are, they say that they are independent. So they are a little bit cold about the victims. —Shelter coordinator, Albania¹⁹

According to the shelter coordinator, a possible reason for this behaviour could be persistent misunderstanding about what trafficking is, as well as what the victims have gone through. Thus, prosecutors are sometimes more sensitive toward victims, precisely because they have had contact with them, while judges have not.

¹⁶ Interview, Police official, Amsterdam, 4 November 2013.

¹⁷ Interview, Police official, Belgrade, 30 October 2014.

¹⁸ Interview, Head of crisis centre, Sofia, 13 October 2015.

¹⁹ Interview, Shelter coordinator, 23 October 2015.

Finally, examples were provided of professionals being abusive to victims. A case manager from Belgrade expressed the view that everything that happens in the courts 'is a demonstration of power'.²⁰ According to the same person, there have been cases of judges who, when entering the courtroom, greet the trafficker who is on trial, and say, 'Hey, X (name of trafficker), how are you?' Another judge, asked a victim of trafficking how much money they took when they migrated for work abroad (and were subsequently trafficked). Upon hearing the answer of 50 euro, the judge stated, 'Ha, I don't even go to the market with only 50 euro!'²¹

Information and Trust

He is still free at the moment. I just came back now, in September, from Spain. He was in Bulgaria in September. He was renewing his ID. When they checked the three names that he is using, it came out on the computer that with one of those names, he had applied for renewal of his ID. How did he pass the borders? I don't know. I know he was here in September, then I don't know. I don't know how they cannot find him. How did he enter Bulgaria? How could he pass the borders? He could have passed through Romania, Serbia, Greece, but how could he enter Bulgaria again? I cannot explain that. And how could he go to the police to renew his ID? I don't have any hope that he will be captured. Especially here in Bulgaria. I don't have one ounce of trust in the police. —Trafficked person, Bulgaria²²

Trust in the professionals with whom they interact, as well as trust in the system itself are crucial factors that determine if the participation in the criminal process has a positive impact on the recovery of the victim.

Respondents noted that it is essential that victims receive information about their rights and obligations, as well as progress of their case, throughout the criminal proceedings.²³ Too often victims do not know what will happen next; are fearful of testifying; and are stressed by the suspense that a case brings. A psychologist notes:

Fear of the suspense is big. So we try to explain, which are the institutions that are included in the process, who cares about them. We explain that we, as the shelter, as an

²⁰ Interview, Case worker, Belgrade, 2 November 2015.

²¹ Interview, Case worker, Belgrade, 2 November 2015.

²² Interview, Trafficked person, Bulgaria, 15 October 2015.

²³ Interview, Lawyer, Vlora, 23 October 2015.

institution, as well as the police and other institutions, we all care about them. They gain some courage. And when these people contact them, when they visit and tell them something, that gives them courage. —Psychologist, Bosnia Herzegovina²⁴

Keeping them informed is the only way to keep fears in check. A case worker stated:

The victims don't understand. They think that in many cases they are the ones being prosecuted, because of the uncomfortable situation. They have already given a statement to the centre for protection. They have already given a statement to the investigative court. They don't understand why they have to testify again. You have to explain to them why it's so complicated and hard. And then, they understand that it's them prosecuting the person. But it's not them, it's the state, and it's not their responsibility, but that of the state.' —Case worker, Serbia²⁵

Another challenge for professionals throughout the prosecution procedure is gaining the trust of the victim. Such trust is often only secured through transparency and action. According to a lawyer from Vlora, Albania:

They create this trust, because we inform them continuously, so they see the progress that is being made. Being informed continuously, so they start to build this trust with us. And the link that we make with the police or with the prosecution, they are present and they hear with their own ears, as we accompany them into these institutions.²⁶
—Lawyer, Albania

A psychologist from Bulgaria notes the importance of the outcome of the criminal process to a victim's state of mind:

When there is the trial and conviction, they feel vindicated, like something that has been wrong with society has been made right. The idea of jail, is not so much about punishment, but re-education. So, when someone does go to jail, they feel vindicated. —Psychologist, Bulgaria²⁷

Prolongation of the criminal proceedings and failure to make an arrest and conviction of the trafficker are ways in which trust is lost and eroded. The very least to be done in these situations is once again to keep the victim informed:

²⁴ Interview, Psychologist, Zenica, 1 October 2015.

²⁵ Interview, Case worker, Belgrade, 2 November 2015.

²⁶ Interview, Lawyer, Vlora, 23 October 2015.

²⁷ Interview, Psychologist, Pernik, 16 October 2015.

Because of the slowness the victims lose the wish and willingness to testify. They don't have the hope that the traffickers will be punished. —Social worker, Bosnia Herzegovina²⁸

There are many questions that are always on their mind—how long will it last, will the traffickers stay in jail, for how long. When they hear that someone is convicted, then they believe in the state, they believe in the institutions, and the power of those institutions. When the police say that we will protect you, but the trafficker is not captured yet, then there is doubt in the power of the police. When they hear that the person is arrested, then it's a big encouragement. —Psychologist, Bosnia Herzegovina²⁹

Legal processes—they tend to be prolonged, and this influences the issue of the beneficiary's trust. Trust in the justice system, in these institutions. In some cases they regret having made this denunciation and having had trust in these institutions. In these cases we have even post-traumatic stress disorder...mainly because of the delays. —Psychologist, Albania³⁰

Protection from Intimidation

His family came, and they put pressure on her, offered her money in order to withdraw the report, but how can she withdraw the report, otherwise she could be punished by the law so you know, it was a real war.... We were obsessed. When somebody was coming and knocked at the door, policeman or the policeman of the periphery.... We were obsessed. That is why I said, let's move from here, because we will die.... And we are really calm here.... —Trafficked person, Albania³¹

Interviewees mentioned on numerous occasions that traffickers are not part of complex organised crime networks, but often individuals who act on their own or in small groups. It may be that the trafficker and his family live in the same city or village as the victim. In these situations, the victim should receive protection not only from actual physical danger but also from 'soft' methods of pressure that can be applied in these contexts.

Unfortunately, threats and pressure are not only aimed towards the victim, but also towards judges and prosecutors. According to a case worker who has often accompanied victims to court:

²⁸ Interview, Social worker, Zenica, 29 September 2015.

²⁹ Interview, Psychologist, Zenica, 1 October 2015.

³⁰ Interview, Psychologist, Vlora, 23 October 2015.

³¹ Interview, Trafficked person, Albania, 29 November 2013.

The trafficker has the main word. He threatens the judge, says, I know your wife, I know your son. He says, if the judge proposes to take away his assets, he will put his house on fire.... The courthouses are so small, everybody is cuddled together, the trafficker threatens the victim.... It's rare to say, oh, I wish every court process was like this. — Case worker, Serbia³²

There is no information as to what impact, if any, such intimidation can have on the criminal justice process.

Not just Conviction, but Financial Compensation

The government is not being... is not taking the payback from the traffickers.... So she never received any penny. And there is another big gap here; the law, that in order to get some money back, she has to pay in advance 5% of this amount requested to the government.... Ok, I will get 20 million lek, that means 50 thousand dollars and I can pay 1%, 2%.... Maybe I am wrong with 5% but it is a percentage.... But how can I pay this percentage when I am just me? When I have felt in this kind of situation, you know. I am a victim. I don't have...otherwise I wouldn't ask. So how can I pay? This is the ridiculous part of it. —Trafficked person, Albania³³

Interviewees emphasised the importance of not only conviction of the perpetrator for crimes of trafficking, but also financial compensation for unpaid wages as well as personal trauma and suffering. As one interviewee explained, financial compensation is a 'recognition that something happened to you, and that what happened was not ok'.³⁴

Very few cases of victims receiving financial compensation were uncovered in the Balkans. Reasons for this could vary: victims may not be aware of the possibility for financial compensation; victims may not have the resources to finance civil action; they may be psychologically unable to participate in criminal proceedings (in situations where prosecution is a prerequisite to action for remedies).

Do you think they even know what compensation is? They just say, I just want him to return my mobile, and my things, that he took from me. Overall, they don't want anything from him. —Case worker, Serbia³⁵

³² Interview, Case worker, Belgrade, 2 November 2015.

³³ Interview, Trafficked person, Albania, 29 November 2013.

³⁴ Interview, Social worker, Amsterdam, 28 March 2014.

³⁵ Interview, Case worker, Belgrade, 2 November 2015.

Often the State will refuse to use confiscated funds to compensate victims and there may be no alternative source of compensation such as a special fund. It was noted that another important change would be to tie the process for financial compensation to the criminal proceedings, instead of requiring a separate trial:

They didn't want to go through the process again, it was traumatic enough up to that point. It would have been useful if that process for compensation was also part of the criminal process, so they don't have to continue. When they have the information, ok, the trafficker is convicted, but now, for financial compensation I have to go further, they rarely want to go on. Even if they are severely poor. It would help if that procedure for the criminal act, also has a decision on compensation. —Psychologist, Serbia³⁶

The Netherlands provides an example of good practice on this point. Under recent legislative changes victims may be compensated by the state as part of the criminal proceedings against their exploiter. Thereafter, it is the state that attempts to recuperate the funds from confiscated assets of the trafficker.³⁷ Thus, with this new possibility, lawyers are tracking down old victims, now eligible for such compensations, to come and claim their money. Those working with victims have noted that financial guidance should be part of this package—so that victims can receive help on managing funds they receive as compensation.

The Label 'Victim' and the Wish to Testify

The police came to the house, asked her information; and she said, she has information, because she knows the people. Said 'yes, I know'. And they asked her if she wants to 'say information'. And she said, of course, I want to say. And I don't speak with anybody. I need to speak. Because I was sick. I was 'banged', I was hit. So, I need to speak. Because I was closed in the house. Very long time.... I go outside, because I cannot sit here. —Trafficked person, Netherlands³⁸

I lived through it. I want him to get what he deserves. For however much is the law, he should be in jail, not a day less not a day more. I want an effective judgment for him. But if he is sentenced here in Bulgaria, that will not be respected. —Trafficked person, Bulgaria³⁹

³⁶ Interview, Psychologist, Belgrade, 3 November 2015.

³⁷ Criminal Code of the Netherlands (Wetboek van Strafrecht), Section 36f, Subsection (6).

³⁸ Interview, Trafficked person, Netherlands. 3 August 2015.

³⁹ Interview, Trafficked person, Bulgaria, 15 October 2015.

In all countries, there must generally be some identification of a person who has been trafficked as a ‘victim’ for them to be eligible to access protection and recovery and reintegration services. However, this is not always an easy and smooth process. As some interviewees mention, their clients may not always want to be identified as victims. In certain cases, it takes years for someone who has been coming to a service centre to finally admit that they are a victim of trafficking. Victim reluctance may be connected to their trafficking experience. For example, in cases where women had some knowledge of the situations they were entering, they may not want to be labelled as victims, and ‘saved’, but simply be provided with another job and better working conditions. Also, if the trafficker is a family member, they may not be willing to be labelled as ‘victims’ nor press charges, due to the emotional ties.

However, there are also cases where victims find it very important to be identified as such: to testify, to secure justice for themselves, and to prevent their exploiters from inflicting harm on anybody else.

We had that amazing person saying ‘now I will tell you, word by word how it happened. How he destroyed my life knowingly. Knowingly he eliminated me as a person. I will tell you everything, and then you see what you do with that information, and what kind of a decision you will take.’ That was... she showed such courage. The sentence was one of the longest sentences. She told them everything. She told them that she knows, that it’s not her fault, it’s not her fault the trial. She said, ‘what you do with this, it’s on you, don’t blame me, for how long the sentence will be’...because in Serbia, they don’t have any additional proof for the case, except for the testimony of the woman. They say, now it will be different, but I don’t see how. —Case worker, Serbia⁴⁰

She was a hero for me, the way she answered, nobody disturbed her, she was courageous, calm. The lawyer was provoking her, saying: you know Serbian, why do you want a translator? And she said: I have a right to answer in my mother tongue, do you maybe want to take it away? She was right next to the trafficker, and was answering...She wanted justice to be satisfied, to put them in jail for what they did wrong. And then, she had a little girl at home, and went away to make money for her, and they tried to abuse her. So, she didn’t want them to get away with that. —Psychologist, Serbia⁴¹

⁴⁰ Interview, Case worker, Belgrade, 2 November 2015.

⁴¹ Interview, Psychologist, Belgrade, 2 November 2015.

Conclusion

Testimonies of trafficked persons as well as of service providers who are in direct contact with them on a daily basis give valuable insight into the issues that arise throughout the prosecution process. Certainly criminal proceedings are not only of importance for the justice system, but have a direct influence on the recovery and reintegration of the victims themselves. But there are many problems. Trials usually last a long time and require victims to testify on numerous occasions. Each testimony is stressful for the victim and may present a possible secondary victimisation. Sharing information with the victim on progress or lack of progress in the case is crucial in order to build trust and ease their participation in criminal proceedings. Insensitivities on the part of criminal justice officials are not uncommon. Specialist training for criminal justice professionals is therefore crucial. Throughout proceedings, victims are often not only in possible physical danger but may experience verbal pressure not to testify from the traffickers or their family members. This must be recognised, and victims must receive the appropriate protection. Although financial compensation is often a legal possibility, it is a road rarely taken in certain countries. One reason for this may be the law itself, which, in Balkan countries, requires financial compensation to be pursued through a separate legal process that can only follow a conviction of the trafficker. Finally, this paper has found that there are cases when victims are not only willing but eager to testify, in order to gain justice for themselves as well as prevent those who have hurt them from hurting other women in similar situations. These findings point to the importance of valuing victim involvement in the criminal justice process for its own sake.

Recommendations

The following recommendations emerge from the information presented above. First, serious attempts should be made to shorten the time of investigation and collection of evidence, as well as to expedite trials. Criminal justice processes that last up to ten years are unacceptable. In order for this to occur, better knowledge of the phenomenon of trafficking by police, prosecutors and judges is crucial. This would make it possible that cases are not solely based on victim testimony but other supporting evidence as well, and quicken the procedure overall. The criminal justice system itself must also reform so as to make sure cases do not get 'stuck'—for example when key officials such as the judge are moved on mid-stream. Given the impact on victims, consideration could be given to imposing a maximum timeframe,

beyond which a criminal case of trafficking may not last. Finally, the criminal process should include measures for compensation or otherwise be tied to civil proceedings so as to expedite the payment of damages.

Second, measures should be put in place to minimise victim exposure in court. Ideally, victims should not be required to testify repeatedly and should be given options that protect them from further harm—such as, speaking, writing, talking to a video camera, talking from a different room adjacent to the courtroom, etc. As far as possible, subsequent investigations and trials should use this material and not demand additional testimony. Corroborative evidence should be used as much as possible in trafficking trials to lessen the burden on the victim.

Third, victims should be kept informed of the progress of their case by their lawyers and case managers. The establishment of a relationship of trust between the victim and relevant criminal justice officials (investigators and prosecutors) is important. If necessary, they should meet with police officials in charge of collection of evidence, as well as prosecutors in charge of the case, so as to make them more familiar and hopefully build trust. Social workers, psychologists and lawyers who already know the victim well should always be present at these meetings for emotional support. In addition, at regular intervals the same service providers should request such meetings where the victim will be officially informed of progress in the case.

Fourth, it is crucial that every single person from the state system and the criminal justice system, and every service provider that may come in contact with a trafficked person has the proper training to handle such situations, and communicate with victims in a way that protects her best interests and prevents further trauma.

Fifth, protection of victims throughout the trial process should be tailored to the particular situation. For example, protection needs might change depending on whether the victim is in physical danger, or under psychological pressure, or both. Primarily, the trafficker and all family members should be prevented and restrained from speaking to the victim or the family of the victim, in all cases. In situations where there is danger to the life of the victim or her family, witness protection should always be possible, not only within the country of origin but also with the possibility of settling the victim anonymously abroad. In cases where the traffickers are not yet arrested, the victim should be regularly informed by the police of any progress in the case, including any information on the possible whereabouts of her alleged exploiter.

Sixth, conviction of the trafficker as well as financial compensation for the victim have strong significance for the recovery and reintegration of victims. As already noted, the Netherlands has made significant progress in this area by obligating the state to ensure compensation of the victim, regardless of whether or not the funds have been confiscated from the trafficker. Other countries should follow this lead. In practice, victims should be advised by their lawyers of the possibility of financial compensation, which would be more likely if ensured by the state, and not solely dependent on confiscated funds of the trafficker.

Finally, while acknowledging that victim status determination is usually essential to the provision of services and entitlements and indeed to commencement of legal action against traffickers, it is important to find ways so persons who have been trafficked are not further victimised by the ‘trafficked person’ label. Many victims find it difficult to identify as such, and they should be left to come to this term by themselves, in their own time, if they so desire. They should have the freedom to see themselves as ‘victims’ or ‘survivors’ or whichever label they prefer, if any at all. Irrespective of that choice, all should feel that the grave harm done to them is recognised, and that they are not to blame. Victims who wish to participate in the prosecution of their exploiters should be given every support possible throughout the process by their case manager, psychologist or lawyer. They can serve as an inspiration not only for other victims but also for the service providers who are with them every day, and are re-energised by the exhibition of such courage and strength from their beneficiaries.

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The Prominent Role of National Judges in Interpreting the International Definition of Human Trafficking

Luuk B Esser and Corinne E Dettmeijer-Vermeulen

Abstract

Although there has been much discussion of the scope of the concept of human trafficking in international literature, the part played by national courts in interpreting definitions based on the international definition of human trafficking in the UN Trafficking Protocol has received little attention. When a judge interprets an offence, he or she clarifies or adds new meaning to it. The space for this is even greater when the underlying definition is broadly formulated, as in the case of the international definition of human trafficking. This article demonstrates that, although this international definition establishes the outer parameters within which conduct must be made a criminal offence, domestic courts still have room to flesh out the definition in national contexts. The role of national judges needs more consideration in today's discourse on the legal definition of human trafficking.

Keywords: human trafficking, definitions, exploitation, abuse of a position of vulnerability

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Definitions and the Absence of the Perspective of the National Judge

Sixteen years after it was drafted, the international definition of human trafficking in the Trafficking Protocol¹ still causes controversy. Many authors and organisations have addressed the complex issues related to the scope of the definition. For example, how can ‘abuse of a position of vulnerability’ be understood? And what sort of evidence is needed in order to prove the definition’s *mens rea* element, i.e. the purpose of exploitation?²

Without any pretence of providing even a remotely comprehensive overview of the available literature, it is possible to identify a number of streams in the current discourse about the concept of human trafficking. One stream seeks to find the similarities and nexuses between human trafficking and new and emerging phenomena that are not at present commonly associated with it. In this regard, a 2013 article by Tyldum is illustrative.³ In it she applies the definition of human trafficking to the (already existing) phenomenon of transnational marriages in Norway and comes to understand the latter as directly related to the former. Here, the definition is used in a functionalistic way; it serves as a framework to deepen the understanding of the characteristics of a (previously presumed to be) distinguishable concept and has, as such, the capacity to shed more conceptual light on other phenomena. A second stream in recent literature is characterised by the ongoing search for the parameters of the definition of human trafficking and, related to this, the most effective perspective on which to build policies. One of the main recent contributors in this respect is Chuang, who criticises the erosion of the definition’s apparent boundaries and pleads for more careful consideration of its scope.⁴ Subsequently, Chuang is, as is Shamir,⁵ advocating a labour perspective or paradigm on human trafficking,

¹ UN General Assembly, *Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, Supplementing the United Nations Convention against Transnational Organized Crime*, 15 November 2000, (Trafficking Protocol).

² UNODC recently published a series of issue papers addressing what states parties to the Protocol identified as ‘problematic’ aspects of the international legal definition of trafficking in persons. See: United Nations Office on Drugs and Crime, *Abuse of a Position of Vulnerability and Other “Means” within the Definition of Trafficking in Persons*, UNODC, Vienna, 2013; United Nations Office on Drugs and Crime, *The Role of Consent in the Trafficking in Persons Protocol*, UNODC, Vienna, 2014; United Nations Office on Drugs and Crime, *The Concept of ‘Exploitation’ in the Trafficking in Persons Protocol*, UNODC, Vienna, 2015.

³ G Tyldum, ‘Dependence and Human Trafficking in the Context of Transnational Marriage’, *International Migration*, vol. 51, 2013, pp. 103–115.

⁴ J Chuang, ‘Exploitation Creep and the Unmaking of Human Trafficking Law’, *American Journal of International Law*, vol. 108, 2014, pp. 609–649.

⁵ H Shamir, ‘A Labor Paradigm for Human Trafficking’, *UCLA Law Review*, vol. 60, 2012, pp. 76–136.

adding an approach that, among other measures, focusses on labour market regulation.

For all the attention that has been devoted to the potential scope of the definition of human trafficking in theory, far less has been written—or is otherwise known—about the role played by domestic courts in delineating the definition. Although States are under an obligation to criminalise the act of human trafficking as laid down in Article 3(a) of the Trafficking Protocol, the definition of human trafficking is sufficiently flexible to enable it to be fleshed out in the ‘local contexts’ of different countries.⁶ Hence, from the outset it was clear that national actors would play a pivotal role in searching for the definition’s exact radius of action. Naturally, the object of interpretation at these national levels is the national definition. However, bearing in mind the transnational background of this definition and the fact that most States have adopted language very similar to the international legal definition in formulating their understanding of trafficking, national interpretations can also be insightful and valuable in an international context. Especially where the national definition is closely aligned with the international counterpart it stems from, interpretations and case law by national courts can be of importance for and add meaning to international debates about elements of the definition.⁷ Of course, the weight of influence should not be overstated and can only be properly understood as *indirect*. A useful analogy might be the concept of ‘subsidiary means’ in the context of international (criminal) law. In Article 38, paragraph 1, under d of the Statute of the International Court of Justice it is stipulated that the Court shall apply *inter alia* (and subject to the provisions of Article 59) ‘judicial decisions and the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law’.⁸ More recently, Van der Wilt described the domestic courts’ role *vis-à-vis* international criminal law as follows: ‘By applying

⁶ UNODC issue papers observe that ‘[the] potential breadth and narrowness of the definition has raised several issues to which States have taken quite different positions’. See, for instance: United Nations Office on Drugs and Crime, *The Concept of ‘Exploitation’ in the Trafficking in Persons Protocol*, UNODC, Vienna, 2015, p. 15.

⁷ Arato is of the opinion that ‘[...] national courts have a particular responsibility to supervise the proper interpretation of treaties because their judgments have a recursive relationship to the treaty being applied’. And: ‘[...] domestic interpretations can have a significant impact on the meaning of a treaty over time. They not only interpret and apply international treaties, but further contribute to their meaning and affect their growth.’ J Arato, ‘Deference to the Executive: The US debate in global perspective’ in H P Aust and G Nolte (eds), *The Interpretation of International Law by Domestic Courts: Uniformity, diversity, convergence*, Oxford University Press, Oxford, 2016, p. 211.

⁸ Statute of the International Court of Justice, accessible online via http://www.icj-cij.org/documents/?p1=4&p2=2#CHAPTER_II, retrieved 10 February 2016.

the law, they [the domestic courts] refine, interpret and—therefore—change the law and they contribute to the further development of international (criminal) law.⁹

To demonstrate the consequences of the space left open for judges, the focus in this article is on the way Dutch courts have interpreted the (national) human trafficking definition that was derived from the Trafficking Protocol. The article presents an analysis of how the Dutch courts have interpreted two main elements of the definition, the element of means, specifically: ‘abuse of a position of vulnerability’, and the element ‘purpose of exploitation’. This article also elaborates upon the term ‘transnational criminal law’ in order to improve our understanding of the relation between *international* definitions and *national* judges. Finally, the focus shifts to the actual application of the national definition by the Dutch courts.

The Role of Domestic Courts in Applying and Interpreting Transnational Crimes

Within international law, human trafficking is considered a transnational crime. This criminological term embraces ‘offences whose inception, prevention and/or direct or indirect efforts involved more than one country’.¹⁰ Expanding on this, Boister introduced the concept of ‘transnational criminal law’, or ‘the indirect suppression by international law *through domestic penal law* of criminal activities that have actual or potential transboundary effects’ [author’s italics].¹¹ Both concepts are directly related. Where the first elaborates on the (transnational) nature of the crimes, the latter is more concerned with the specific action prescribed and, subsequently, the actor who has the task to take

⁹ Van der Wilt makes this remark in an article on the influence of domestic courts on international criminal law. H van der Wilt, ‘Domestic Courts’ Contribution to the Development of International Criminal Law: Some reflections’, *Israel Law Review*, vol. 42, 2013, p. 209.

¹⁰ A.CONF.169/15/Add.1, 4 April 1995, https://www.unodc.org/documents/congress//Previous_Congresses/9th_Congress_199517_ACONF.169.15.ADD.1_Interim_Report_Strengthening_the_Rule_of_Law.pdf, retrieved 7 July 2015. For the history of this term, see: G Mueller, ‘Transnational Crime: Definitions and concepts’ in P Williams and D Vlassis, *Combating Transnational Crime: Concepts, activities and responses*, Frank Cass Publishers, London/Portland, 2001, p. 14.

¹¹ N Boister, ‘“Transnational Criminal Law?”’, *European Journal of International Law*, vol. 14, 2003, p. 955. See for a more thorough treatise of this subject by the same author: N Boister, *An Introduction to Transnational Criminal Law*, Oxford University Press, Oxford, 2012.

action. Prominent in Boister's definition of transnational criminal law is the dual responsibility for realising an effective approach of transnational crime, for both international *and* national actors. On the one hand, the outer parameters within which conduct must be made a criminal offence are established at the international level. National actors, on the other hand, have to take steps to actually criminalise the behaviour (States) and apply and interpret the definition in practice. Accordingly, when it comes to the 'realisation of criminalisation', there is a degree of interdependence observable between transnational and national law.

Human trafficking's status as part of transnational criminal law is not the sole explanation for the domestic courts' paramount role. No less important is the method by which the definition was established at the international level. A definition can be formulated in such a way as to leave little room for doubt about its scope or it can be worded in what could be described as open-ended terms. The latter increases the chance that actors within States, responsible for applying and interpreting the law, will play a major role in determining the scope of application of the definition. That is the case with human trafficking. The drafting history confirms that in order to accommodate many parties with divergent interests, aspects of the definition were deliberately left vague.¹²

Accordingly, the international definition of human trafficking leaves room for interpretation of its individual components.¹³ That is noteworthy in view of the high standards that should be met in terms of certainty and predictability in the law, particularly in criminal law.¹⁴ However, when little is known about a particular phenomenon at the time it is being criminalised and when there are strong priority reasons to secure consensus, it is perhaps preferable not to make the law too rigid, but to leave room for the courts to apply it in practice in specific cases. That was also the feeling in relation to human trafficking,

¹² For an overview of the key issues at stake during the drafting process of the Trafficking Protocol, see: A Gallagher, *The International Law of Human Trafficking*, Cambridge University Press, Cambridge, 2010, para 1.2.1. See also: Chuang, p. 610.

¹³ Every norm, however precisely formulated, in fact leaves some room for interpretation. Or, as the European Court of Human Rights succinctly expressed it in a landmark judgment: 'However clearly drafted a legal provision may be, in any system of law, including criminal law, there is an inevitable element of judicial interpretation. There will always be a need for elucidation of doubtful points and for adaptation to changing circumstances.' ECtHR 22 November 1995, appl.no. 20190/92 (*C.N. v. UK*), para 34.

¹⁴ Regarding the meaning of the principle of legal certainty in criminal law, see: M Faure, M Goodwin and F Weber, 'The Regulator's Dilemma: Caught between the need for flexibility & the demands of foreseeability. Reassessing the *lex certa* principle', *Albany Law Journal of Science & Technology*, vol. 24 (2), 2014, pp. 283–364.

especially with respect to forms of exploitation outside the sex industry, which many countries had not yet any experience addressing as a criminal phenomenon.

In sum, that human trafficking is part of transnational criminal law implies that states and domestic courts play a major role in the actual realisation of the human trafficking criminalisation. In this case, the open definition, presuming it is transposed without clarification into domestic law, can be considered problematic (in light of the principle of legal certainty), but can also be conceived as an invitation to domestic courts to flesh out its precise meaning in their respective local contexts. The next section reviews how the Dutch courts have approached that invitation.

The Human Trafficking Provision in the Dutch Criminal Code and its Interpretation by the Supreme Court

In the Netherlands the main source of criminal law is the Dutch Criminal Code, but the scope of the human trafficking provision cannot properly be understood without taking into account decisions of the Supreme Court.¹⁵ Human trafficking for the purposes of sexual exploitation already was an offence under Dutch criminal law when the Trafficking Protocol was drafted. Human trafficking is a criminal offence under Article 273f of the Dutch Criminal Code (DCC). Legislators decided to take the Protocol definition almost verbatim, thereby widening the range of human trafficking to other forms of exploitation and ensuring alignment with international law. The offence stipulated in Article 273f paragraph 1, under 1, involves (1) an action (2) by certain means and with a specific intention (the criminal intent), (3) the purpose of exploitation. In a series of judgments, the Supreme Court has shed further light on how the individual components of this definition should be interpreted. This case law has concentrated on the interpretation of the means element, in particular ‘abuse of a position of vulnerability’, and the criminal intent element: ‘the purpose of exploitation’.

¹⁵ In this regard, the Dutch legal scholar Rozemond speaks about the ‘method of substantive criminal law’ by which he means that the exact scope of the substantive criminal law can only be found when the criminal provision in the Code and the Supreme Court’s judgments are taken together. K Rozemond, *De methode van het materiele strafrecht*, Ars Aequi Libri, Nijmegen, 2006 (in Dutch only).

Abuse of a Position of Vulnerability (APOV) in the International Definition of Human Trafficking¹⁶

Abuse of a position of vulnerability (APOV) is one of the ‘means’ in the international definition of human trafficking and, apart from its inclusion in the Trafficking Protocol, it is not otherwise known to international law.¹⁷ According to the *travaux préparatoires* to the Protocol, the term is to be understood ‘as referring to any situation in which the person involved has no real or acceptable alternative but to submit to the abuse involved’.¹⁸ Essentially, this requires that in each individual case, it has to be established whether (1) there was a position of vulnerability, and, if so, (2) whether the suspect (intentionally) abused that position to secure the ‘act’ element of the offence. To prove this, therefore, it is necessary to consider the situation of both the victim and the suspect. Neither the Trafficking Protocol nor the various guidance material available elaborate on these requirements. An issue paper on this subject published by the UNODC in 2012, which included the results of a survey of law and practice in 12 countries, confirmed wide variation between States with regard to how this means is understood and applied. The main area of discussion concerned the question of what exactly constitutes a ‘position of vulnerability’ and the differences in the evidentiary requirements for establishing abuse of that vulnerability. Unquestionably, the term is very open-ended. Should a person’s precarious financial situation constitute a position of vulnerability, for example? Is a person’s status as an illegal immigrant in itself sufficient to presume the existence of a position of vulnerability? And what kind of intentional involvement is required to prove the defendant’s abuse of an established vulnerability? The issue paper provides important insight into these questions and includes a Guidance Note for Practitioners that sets out key issues for consideration.

Abuse of a Position of Vulnerability in the DCC and Case Law in the Netherlands

In Dutch case law, abuse of a position of vulnerability (APOV) plays a significant role. In a quantitative study into 83 Dutch cases conducted in 2012 by the Office of the Dutch Rapporteur on Trafficking in Human Beings and

¹⁶ This section draws on the relevant issue paper produced by the United Nations on this subject: United Nations Office on Drugs and Crime, *Abuse of a Position of Vulnerability and Other “Means” within the Definition of Trafficking in Persons*, UNODC, Vienna, 2013.

¹⁷ *Ibid.*, p. 17.

¹⁸ United Nations Office on Drugs and Crime, *Travaux Préparatoires of the Negotiations for the Elaboration of the United Nations Convention against Transnational Organized Crime and the Protocols Thereto*, 2006, p. 347.

Sexual Violence against Children, it appeared that in almost all cases APOV was included in the indictment. Moreover, in all cases of trafficking for labour exploitation that led to a conviction, APOV was established.¹⁹ APOV truly is—in the wording of the UNODC issue paper on this subject—‘[...] an inherent feature of most, if not all, trafficking cases’.²⁰

Not surprisingly, it did not take long for the Supreme Court to render its first decision on the interpretation of this means of trafficking. In 2009, the Court delivered a landmark judgment which set out the requirements that have to be met to prove the abuse element (the *Diamond City* case).²¹ Furthermore, the legislative history and Supreme Court judgments from before 2005, when the international definition was incorporated into the Dutch Criminal Code, are still relevant, since one of the means specified in the already existing Dutch definition of human trafficking is ‘abuse of the position of dominance arising from the factual relationships’. According to the Supreme Court, this concept overlaps with that of APOV.²² Many of the examples discussed by legislators in 1988, when the national definition of human trafficking was being debated in Parliament, would therefore also have been included under the term ‘abuse of a position of vulnerability’ today. Because the intention of the 1988 legislation was to provide extensive protection against every form of force or compulsion in the sex industry, legislators opted for a relatively broad approach: stipulating that the means ‘abuse of the position of dominance arising from the factual relationships’ is sufficiently proven ‘when the prostitute is in a situation or comes into a situation that is other than the circumstances accepted by an assertive prostitute in the Netherlands’.²³ Examples provided included indebtedness, drug addiction, not possessing documentation and lack of personal financial resources. In its 2009 judgment, the Supreme Court also ruled that a person’s illegal status places that person in a vulnerable position.²⁴

¹⁹ Dutch Rapporteur on Trafficking in Human Beings, *Trafficking in Human Beings. Case law in trafficking in human beings 2009–2012. An analysis*, BNRM, The Hague, 2013, para 4.4.3.

²⁰ United Nations Office on Drugs and Crime, *Abuse of a Position of Vulnerability and Other “Means” within the Definition of Trafficking in Persons*, UNODC, Vienna, 2013, p. 71.

²¹ *Diamond City* case. This decision is fully translated into English and available through the online UNODC Case Law Database. Retrieved 1 July 2015, https://www.unodc.org/res/cld/case-law/nld/2009/diamond_city_html/Diamond-English_version.pdf

²² Dutch Rapporteur on Trafficking in Human Beings, *Trafficking in Human Beings. Case law in trafficking in human beings 2009–2012. An Analysis*, BNRM, The Hague, 2013, para 4.4.5.

²³ *Ibid.*, p. 61. The authors purposely do not refer to the original documents, since these are only available in Dutch. The case law report of the Dutch Rapporteur however consists of an in-depth analysis of the history of the Dutch human trafficking legislation in English.

²⁴ *Diamond City*, para 2.6.2.

A vulnerable position alone however is not enough to prove abuse of a position of vulnerability. In the aforementioned judgment of 2009, the Supreme Court elaborated on the criteria that have to be met to establish such abuse. The judgment was rendered in a trafficking for labour exploitation case involving Chinese irregular immigrants who had, literally, begged the owner of a Chinese restaurant for work. Before looking at the criteria given by the Supreme Court, it is useful to focus at the facts. The Appeal Court in the underlying case established *inter alia* the following facts:

- The irregular Chinese immigrants involved as victim-witnesses had decided to come to the Netherlands of their own accord in order to earn money.
- They applied for work to the restaurant owner: a number also asked for meals and lodging and a number asked solely for meals and lodging. The last group then worked in exchange for meals and lodging, without receiving any further remuneration.
- None had any monetary debts or other obligations towards the restaurant owners. All were free to depart at any time they wished. A number of them had already worked in the Netherlands at one or more other locations.²⁵

The legal question that arose in this case was whether it could be said under these circumstances that the restaurant owner abused the position of vulnerability of the irregular migrants. In its consideration of the judgment of the Court of First Instance, the appeal court answered this question in the negative and considered that, in view of the facts mentioned above:

It is not possible to state that the accused and/or one or more others had taken the initiative or acted actively towards the aforementioned Chinese, for example by approaching them or persuading them to work in the restaurant. Rather, they responded to requests and, in a number of instances, pleas from the Chinese. In view of these circumstances it is not possible to find proved that the accused and/or one or more others purposefully abused a position of dominance arising from the factual relationships with or the weaker/vulnerable position of the Chinese in accommodating or harbouring them.²⁶

What the appeal court in this case did was interpret the means of APOV in such a way that it became an evidentiary requirement to determine whether an accused *purposefully* abused the vulnerable position, for instance by taking the initiative and playing an active role in the recruitment process of victims. The

²⁵ *Diamond City*, para 2.2.2.

²⁶ *Ibid.*

Supreme Court however did not follow the judgment. In contrast, it ruled that:

[...] adequate proof of ‘abuse’ has been submitted when it is established that the perpetrator must have been aware of the relevant factual circumstances of the person concerned from which the position of dominance arose or may be presumed to have arisen, in the sense that these circumstances gave cause to the perpetrator’s conditional intent. The same is applicable to situations in which the victim is in a vulnerable position as referred to in the provision. It should be noted that in addition to this requirement of intent another, more stringent, requirement of intent is applicable to the exploitation, namely the purpose of exploitation.

The judgment of the Supreme Court takes a different approach when establishing the evidentiary requirements to prove the abuse element in the context of APOV. Where the appeal court explicitly focusses on the degree of initiative of the accused and his active role in the process of recruitment, the Supreme Court determined that a lower threshold was required. There is, according to the Court, already a presumption of abuse at such time as the offender is aware of the factual circumstances that create the vulnerable position. To put it another way: the conscious use of a position of vulnerability itself constitutes the abuse (one can call this the *use = abuse doctrine*). This decision confirms that the scope of this means is actually (in the specific circumstances of that case) and potentially (in relation to different circumstances) very wide. In this instance, the accusation being made against the suspect is that he acted, for example, by employing people in a vulnerable position, despite being aware of their vulnerability. To prove this, it does not have to be established that he also purposefully intended to abuse the position of those individuals in that situation.

This approach has been criticised, nationally and internationally.²⁷ Some authors are of the opinion that this interpretation contributes to an expansion of the definition, rendering it capable of including within its scope conduct that has little to do with the concept of trafficking. The UNODC issue paper on APOV states that ‘[...] the low standard set in some countries, whereby perpetrators are not required to have taken any initiative in order for the element to be proven, differentiates APOV from other means, all of which appear to require some level of action or initiative by on behalf of the alleged perpetrator’.²⁸ However, international law does not prevent States to use a broader interpretation of the definition. And although the term ‘abuse’ undeniably points in the direction of a perpetrator acting deliberately, the nature of the intent is not further elaborated upon in international law. Thus, the fact that the Dutch Supreme Court applies one of the lower forms of criminal intent—the conditional intent—fulfils the intent requisite. Finally, to establish human trafficking also requires proof of other elements. As shown below, the element ‘purpose of exploitation’ and its interpretation by the Supreme Court prevents the human trafficking definition from becoming overly inclusive.

The Mens Rea Element: Purpose of exploitation

In the definition of human trafficking, exploitation is primarily the purpose for which the actions are undertaken. To cite Gallagher, the purpose of exploitation constitutes the *mens rea* element of the international definition of human trafficking and therefore rests on intention: what was the suspect’s intention while performing the acts and utilising the means?²⁹ It is beyond the scope of this article to discuss at length the relevance of intention in criminal law. In discussing ‘purpose of exploitation’, the main question is how to establish that a person specifically intended to exploit another person. To do that, it is necessary to (1) form a judgment of what constitutes exploitation and (2) formulate requirements regarding the degree to which the suspect’s intentions can be ascertained. Suspects generally remain silent about their intentions, and in those cases, the court is compelled to establish intent on the basis of available evidence.

²⁷ United Nations Office on Drugs and Crime, *Abuse of a Position of Vulnerability and Other “Means” within the Definition of Trafficking in Persons*, UNODC, Vienna, 2013, p. 81. See also the critical comment about this judgment by legal scholar Buruma. Dutch Supreme Court, 27 October 2009, ECLI:NL:HR:2009:BI7099, NJ 2010, 598 with comment by Y Buruma (in Dutch only).

²⁸ United Nations Office on Drugs and Crime, *Abuse of a Position of Vulnerability and Other “Means” within the Definition of Trafficking in Persons*, UNODC, Vienna, 2013, p. 81.

²⁹ Gallagher, p. 34.

The Purpose of Exploitation in the Case Law of the Dutch Supreme Court

In the aforementioned judgment of 2009, the Supreme Court also ruled on how the ‘purpose of exploitation’ can be established. Before discussing its findings, it is important to note that ‘purpose’, as one of the forms of intent, already existed in Dutch criminal law. According to the standard formula adopted by the Supreme Court, a suspect can be said to have acted with a specific purpose if he must have realised that his actions would lead or have led to the other person being exploited and that, consequently, this was what the suspect wished.³⁰ The ‘purpose’ requirement therefore calls for more than *dolus eventualis*; the suspect must not simply have been aware of the possibility of a particular consequence, but must also have specifically desired that consequence: *dolus specialis*.³¹

To examine whether this requirement is met, the Court must have an idea of what constitutes exploitation, since only then can it address the question of whether the evidence that was furnished has shown to have been the suspect’s purpose. Subsection 2 of the relevant Dutch law contains a non-exhaustive list of forms of exploitation, which follows more or less the wording of Article 3(a), second part, of the Trafficking Protocol.³² The logical course to take in interpreting ‘exploitation’ would be to follow the various forms of exploitation listed in the law and the definitions of them that already exist at the international level or indeed in national law itself.³³ However, the Supreme Court took a different path and chose instead to formulate a number of factors that should apply in assessing every form of exploitation, regardless of the precise form of exploitation. Relevant factors in that

³⁰ The standard evidential criterion for the purpose element is formulated in Dutch Supreme Court, 21 April 1998, ECLI:NL:HR:1998:ZD1031.

³¹ See for more on the modes of intention distinguished in criminal law: T Weigend, ‘Subjective Elements of Criminal Liability’ in M D Dubber and T Hörnle, *The Oxford Handbook of Criminal Law*, Oxford University Press, Oxford, 2014, chapter 22.

³² The list was recently supplemented with forced begging and exploitation in criminal activities with the implementation of the EU Human Trafficking Directive. Directive 2011/36/EU of the European Parliament and of the Council on preventing and combating trafficking in human beings and protecting its victims, and replacing Council Framework Decision 2002/629/JBZ, 5 April 2011. The directive was published in the Official Journal of the EU, OJ 2011, L 101/1 on 5 April 2011.

³³ For instance, the existing definition of ‘forced or compulsory labour’ as laid down in the ILO Forced Labour Convention (ILO Convention of 28 June 1930 concerning Forced or Compulsory Labour). See for a recent analysis of other legal concepts surrounding the trafficking definition: N Siller, “Modern Slavery” Does international law distinguish between slavery, enslavement and trafficking?, *Journal of International Criminal Justice*, vol. 14, 2016, pp. 1–23.

context, the Supreme Court found, include the nature and duration of the work, the limitations it imposes on the individual concerned and the economic advantage accruing to the employer. Furthermore, the frame of reference for weighing these and other relevant factors should be the prevailing social standards in the Netherlands.³⁴ It is not necessary for all of the factors to apply. Ultimately, the various factors have to be weighed against each other; some will weigh more heavily than others in some cases, while different factors will weigh more heavily in others.³⁵ It is possible, for example, that in a particular situation the employer enjoys a major financial advantage but imposes relatively few limitations on the victim. This perspective can be particularly important in cases where victims do not self-identify as having been exploited. In other cases, it might not be the profit made that stands out, but rather the number of hours worked, the nature of the work or the limitations that the situation imposed on the employee. In the case of the Chinese immigrants, the Supreme Court qualified the decision by the Appeal Court that the purpose of exploitation could not be established as incomprehensible in view of the facts and the criteria mentioned above.³⁶

In a 2015 judgment the Supreme Court added another dimension to these criteria when it ruled that the outcome of this ‘weighing of perspectives’ can be different when the victim is a minor.³⁷ The Court’s meaning and the implications of this aspect of the judgement are both unclear, but it must be assumed that it calls on lower courts to include in their weighting the fact that the victim in the case is a minor.

The factors enunciated by the Supreme Court provide a clear framework that reflects the complexity of the element ‘purpose of exploitation’ and the variety of forms that exploitation can take and contexts in which it can occur. In practice, this framework serves as an important benchmark, which is decisive for establishing the parameters of the offence.

³⁴ *Diamond City*, para 2.6.1.

³⁵ See also the advisory opinion of Advocate-General Knigge in the *Diamond City* case, https://www.unodc.org/res/cld/case-law/nld/2009/diamond_city_html/Diamond-English_version.pdf, retrieved 7 July 2015 (available in English).

³⁶ *Diamond City*, para 2.6.2.

³⁷ Dutch Supreme Court 24 November 2015, ECLI:NL:HR:2015:3309 (not available in English). Repeated in Dutch Supreme Court, 5 April 2016, ECLI:NL:HR:2016:554.

Conclusion

This article shows the discretion that domestic courts enjoy in clarifying the definition of human trafficking and thereby provides insight into the interaction between international and national law in cases involving transnational criminal law (as is the case in the field of human trafficking). This interaction is one of mutual dependence. On the one hand, national courts are bound to render judgment within the boundaries of the international parameters, in this case (the elements of) the international definition of human trafficking as integrated into national law. At the same time, we have seen that the use of open norms in that definition invariably requires domestic courts to engage in interpretation. In that context, relevant developments in the Netherlands have been the broad interpretation of APOV (and the enduring influence of national legislative history around this concept) and the decision to interpret ‘purpose of exploitation’ without making a distinction between the different forms of exploitation. The fact of such interpretation is not surprising. As the UNODC Studies confirmed, the international legal definition of trafficking is interpreted in significantly different ways and only assumes concrete form in the individual States.³⁸

The space left for domestic courts to give further meaning to the definition of human trafficking raises the question of how unavoidable differences in interpretations between different states should be understood. The answer depends on the perspective from which the interaction between international and national law is assessed. Some tend to opt for a more ‘sovereignist perspective’, arguing that criminal law is primarily the province of (democratically legitimated) national legislators.³⁹ On that basis, the room that is left to the courts to interpret the definition of human trafficking can be regarded as positive. In contrast, for adherents of a more uniform application of global definitions and norms, the discretion granted to domestic courts defeats the original purpose of developing a universal understanding of human trafficking, namely to harmonise national legal frameworks in order to facilitate more effective international cooperation.

³⁸ United Nations Office on Drugs and Crime, *Abuse of a Position of Vulnerability and Other “Means” within the Definition of Trafficking in Persons*, UNODC, Vienna, 2013; United Nations Office on Drugs and Crime, *The Role of Consent in the Trafficking in Persons Protocol*, UNODC, Vienna, 2014; United Nations Office on Drugs and Crime, *The Concept of ‘Exploitation’ in the Trafficking in Persons Protocol*, UNODC, Vienna, 2015.

³⁹ For more on this ‘tendency’, see: J Ouwerkerk, ‘Criminal Justice beyond National Sovereignty’, *European Journal of Crime, Criminal Law and Criminal Justice*, vol. 23, 2015, pp. 11–31.

Whatever viewpoint is taken, domestic courts will continue to play a major role in the application and interpretation of national definitions derived from the international human trafficking definition. To cite van der Wilt again, domestic courts are able to ‘refine, interpret and—therefore—change the law and they contribute to the further development of international (criminal) law’.⁴⁰ As noted previously, the international definition of human trafficking in the Trafficking Protocol still generates controversy, and many authors and organisations have addressed the complex issues that arise with regard to the scope of the definition. Remarkably, less attention has been paid to the application and interpretation of national definitions. Mindful of the prominent role of national judges, this is a subject that needs more attention. This new stream in the discourse on the legal definition of human trafficking is more than welcome.

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⁴⁰ H van der Wilt, ‘Domestic Courts’ Contribution to the Development of International Criminal Law: Some reflections’, *Israel Law Review*, vol. 42, 2013, p. 209.

ATR Debate Proposition: 'Prosecuting trafficking deflects attention from much more important responses and is anyway a waste of time and money'

Investments in Human Trafficking Prosecutions are Indispensable

Victor Boutros and John Cotton Richmond

Response to ATR Debate Proposition: ‘Prosecuting trafficking deflects attention from much more important responses and is anyway a waste of time and money’

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We reject the proposition that prosecuting human trafficking cases deflects attention from much more important responses and is anyway a waste of time and money. Reducing the vulnerability of potential victims, survivor care, and the prosecution of traffickers are all vitally important responses to trafficking. However, to abandon prosecution as a ‘waste of time and money’ is to allow traffickers to operate with impunity and ensure that the exploitation will continue.

Prosecution is Essential to Successfully Combating Human Trafficking

Effective prosecution of traffickers is a necessary component of any long-term effort to substantially reduce the prevalence of trafficking. While some may appropriately decry the way in which certain human trafficking prosecutions are carried out (e.g., how survivors are treated, whether criminal justice standards are appropriately respected, which traffickers or industries are prioritised), few argue that fair and efficient prosecutions of traffickers are a ‘waste of time and money’. Likewise, some might decry substandard efforts to reduce vulnerability or care for survivors, but the existence of ineffective programmes does not support the conclusion that all such endeavours are a waste of time and money. When faced with examples of weaknesses within the criminal justice response, the logical conclusion is to fund and support improvements to the system—not to abandon accountability efforts altogether.

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Holding human traffickers accountable for their crimes is *essential* to changing their business model. Without a credible risk of criminal sanction, traffickers have every incentive to prefer forced labourers and higher profit margins to voluntary labourers, who have to receive sufficient wages and benefits to prevent them from working for a competitor. However, a credible risk of serious criminal sanction has the power to make the trafficker's decision to use forced labourers rather than voluntary labourers too costly. Traffickers committed to the economic bottom line may give up forced labour if it means facing a serious risk of losing their entire business, forfeiting their ill-gotten gains, and sacrificing their freedom.

The fact that effective prosecutions are essential to reducing the prevalence of trafficking does not mean we should pursue less vulnerability reduction or survivor care. They also are essential—and when vulnerability reduction, survivor care, and prosecution are all done well, they are mutually complementary and reinforcing. But the indispensability of fair and effective prosecutions means that we will not see a significant decline in the prevalence of trafficking without them.

The Umbrella Effect—Neglecting meaningful investment in effective prosecution shelters traffickers' ability to exploit with impunity

If effective prosecutions of human traffickers are a necessary component of any successful effort to substantially reduce the prevalence of trafficking, then we must meaningfully invest in them. A 2012 study by the International Labour Organization suggests that while approximately 7% of the world's forced labour victims reside in developed economies and the European Union,¹ the vast majority is in developing countries. Yet, estimates suggest that only about 1% of aid from institutions like USAID or the World Bank can even plausibly be described as targeting improvements in developing countries' criminal justice systems so that they better protect the poor from trafficking and other forms of criminal violence.² Serious and sustained investment in the prosecution project has not been tried and found impossible—it has been found hard and left largely untried.

¹ ILO *Global Estimate of Forced Labour: Results and methodology*, International Labour Organisation, Geneva, 2012, pp. 15–16.

² G Haugen and V Boutros, *The Locust Effect: Why the end of poverty requires the end of violence*, Oxford University Press, New York, 2014, p. 203.

It is notoriously difficult to determine exactly how counter-trafficking resources are directed, but it is safe to say that a substantial proportion focuses on interventions to reduce the vulnerability of potential trafficking victims and care for or provide benefits to survivors. These efforts are critically important, but in the absence of a reasonably functioning justice system to enforce a country's domestic laws against human trafficking, they do tragically little to change the trafficker's business model. Reducing the vulnerability of potential victims is important and empowering in its own right, but it often has little impact on the trafficker's incentives to find others to exploit. Similarly, it is essential to provide services and support for survivors, but caring for those who the trafficker is no longer exploiting has little impact on the trafficker's ability to profit off those the trafficker is currently exploiting. In the absence of effective prosecution, traffickers will continue to add to the number of individuals who will require services and care when they are ultimately free from the trafficker's control.

The fact that vulnerability reduction and survivor care have little impact on the trafficker's business model does not diminish their value. Indeed, the primary target of those interventions is not the trafficker, but potential victims and survivors, respectively. It is vital to continue to empower these groups. However, as far as the trafficker is concerned, pouring more resources into these categories of investments without also meaningfully investing in effective prosecutions can create a sort of *umbrella effect*—showering resources on those the traffickers have not yet exploited and those they are no longer exploiting while sheltering the traffickers and leaving those they are currently exploiting untouched.

Developing criminal justice systems that fairly and efficiently prosecute human trafficking is difficult and costly. They are not going to come from *ad hoc* investments over 24–36-month grant cycles, and we will not be ready to make the necessary investment of time and resources until we are convinced that we cannot succeed without them. But once we recognise that serious and sustained investment in effective prosecution is indispensable in the battle to substantially reduce the prevalence of trafficking, every critique of brokenness in a criminal justice system becomes not an argument to abandon the prosecution project, but an obligation to improve it.

Conclusion

Serious investment in developing the capacity of criminal justice systems to effectively prosecute trafficking is, therefore, an indispensable part of a victim-centred approach to stopping traffickers. The victims that traffickers are exploiting in mills, factories, farms, and brothels may need shelter and support services once their trafficker is no longer harming them. We must ensure those services are available. But in the absence of successful prosecutions, traffickers will remain at liberty to profit from the vulnerable by recruiting, grooming, coercing, and exploiting more victims, generating a constant need for more survivor services in the future. If we allow traffickers to operate with impunity, we put more victims at risk of criminal exploitation. Prosecuting traffickers can help prevent the exploitation of new victims, provide relief to those currently being exploited, and empower survivors to seek the services they need.

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Prioritising Prosecutions is the Wrong Approach

Kate D'Adamo

Response to ATR Debate Proposition: 'Prosecuting trafficking deflects attention from much more important responses and is anyway a waste of time and money'

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How do we define success in the fight against trafficking? In the news media and in the US State Department's *Trafficking in Persons Report*, the answer always seems to highlight the same narrow list: increased penalties, arrests and prosecutions. But even as these strategies receive the most attention and glory, they take our focus away from those who should be centred in the conversation—the victims and survivors. Ignoring their needs guarantees we will never end human trafficking. Criminal prosecutions are not the most important part of anti-trafficking work, and their prioritisation is moving us away from ever meaningfully addressing the problem.

While in the United States, law enforcement agencies use the rhetoric of 'victim-centred' approach, prosecutions are, by their very nature, not victim-centred. Prosecutions ask us to focus our time, attention and resources on the trafficker or other third parties, and the victim often becomes little more than a tool for that purpose. And while the trafficker may receive a long prison sentence, this outcome does nothing to help the person victimised find housing, or stable employment, or reunite with their children. For those leaving a trafficking situation, this often means returning to the conditions which made them vulnerable in the first place. So while one trafficker may be in jail, the next one will be there to take advantage of vulnerabilities that still persist.

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To compound this, the process of prosecution often further harms the victims. Recounting traumatic events to numerous attorneys, case managers, and a jury can re-open wounds and re-traumatise victims who wish to move on with their lives. Prosecutors and investigators may ask victims to interact further with the trafficker to get needed information, or to delay applications for other remedies so as not to detract from the criminal case. At best, a successful prosecution might bring a sense of justice to the individual, and in rare instances can bring settlement to compensate for financial harms. At worst, it can re-open emotional wounds or even put victims in further danger.

Despite these unintended consequences, the criminal justice system remains the primary way that countries seek to end trafficking. Showing increasing numbers of arrests, prosecutions, and longer sentences are viewed as success in the fight against trafficking.

A trafficking situation never begins the day someone is trafficked. Often the story begins years earlier with poverty, housing and food instability, lack of education, labour exploitation, discrimination and/or domestic violence. These factors create the vulnerability that pushes many into trafficking and exploitative situations. In the Sex Workers Project study *The Road North*, which looked at the experience of trafficking victims who had emigrated from Mexico to New York, 75% described financial hardship in their lives leading up to the experience, 33% described food insecurity and 82% had not been able to continue their education beyond the tenth grade. Social isolation of LGBTQ communities, criminalisation of migrants and sex working communities, and proliferation of class and ethnic stigma are all contributing factors. When a sex worker cannot report violence for fear of arrest, they are vulnerable to victimisation by a trafficker. When a migrant fears deportation and remains bound to the employer despite working 20-hour days below minimum wage, they are vulnerable to trafficking. When a transgender young person cannot find a suitable shelter and is forced to either trade sex or sleep on the street, they are vulnerable to trafficking. When the only two options in a local area are to work for a factory paying poverty-level wages or complete destitution, trafficking and exploitation will flourish. We must see where we are manufacturing these vulnerabilities through our policies, and address these before someone is trafficked or exploited. Economic and social justice demands commitment to reforming our communities and societies, if we really do wish to end trafficking in persons. Prioritising prosecution above all other forms of anti-trafficking work diverts us from solutions which address this vulnerability—and solutions which seek to prevent human trafficking from occurring in the first place.

Trafficking is a crime of extreme exploitation; and it is the overarching economic and social injustice that frames the actions of both the victim and the victimiser. But when we simply arrest and prosecute, we still leave trafficking victims to struggle to find a way to survive in an economy dominated by inequality and exploitation. We must address these root causes to get to the heart of anti-trafficking work. We must celebrate the work of unions which put in place labour protections, community organisations which support members in times of crisis, and gender justice organisations which address the marginalisation of women and transgender individuals, all of whom are doing invaluable work to stem and prevent trafficking and exploitation.

Prosecutions are fuelled by our justifiable outrage, but they can distract us from where we must centre our attention. By looking to those victimised, before and after a trafficking situation, we can find a way forward where we do more than punish trafficking—we prevent it.

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The Importance of Strategic, Victim-Centred Human Trafficking Prosecutions

Susan French and Cindy C Liou

Response to ATR Debate Proposition: ‘Prosecuting trafficking deflects attention from much more important responses and is anyway a waste of time and money’

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Most nations have passed legislation criminalising offences included within the broad definition of human trafficking in the Trafficking Protocol.¹ Criminalising, while failing to prosecute trafficking offences, undermines the intent and language of the Trafficking Protocol and national laws reflecting its principles. Effective prosecution of traffickers, concomitant with protection and keen attention to protecting the victim, sends a powerful message to offenders that their criminal conduct has dire consequences. Safeguarding a person’s freedom through enforcement of laws prohibiting slavery, involuntary servitude, peonage, forced labour, slave-like conditions, and trafficking is intrinsic to a just society operating pursuant to the rule of law.

Although prosecution can aggravate victim traumatisation, we know from personal experience with trafficking survivors that prosecution can help victims obtain judicial vindication that both the law and their rights were violated. Courts, impartial entities of the state, can affirm for victims that the law was violated. This recognition helps facilitate the healing process for a victim moving towards survivor status.

¹ In full: UN General Assembly, *Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, Supplementing the UN Convention against Transnational Organized Crime*, 15 November 2000.

Civil litigation is an empowering legal option in the United States, and an important alternative when the government does not prosecute. While civil litigation may provide judicial vindication and monetary damages, it cannot protect the victim nor physically prevent the traffickers from victimising more persons. In civil cases, locating assets and collecting damages is challenging, while criminal restitution—which must be sought by prosecutors—can be collected using government agencies. Private litigants must rely on expensive private counsel or limited *pro bono* resources that lack access to criminal investigative tools.

Many countries spend resources aggressively prosecuting cases that may adversely affect unidentified trafficking victims or wrongly prosecuting trafficking victims themselves. Examples in the United States include the over-policing, prosecution, and deportation of sex workers and youth trafficked by gangs to facilitate human and drug smuggling.

Meaningful and successful prosecutions are the result of victim-centred investigations and prosecutions. Prosecuting trafficking cases is labour intensive and time consuming because the most important evidence is the traumatised victim witness, who must be stabilised. Victims must be credible and their story corroborated.

Cases of extreme violence and conscience-shocking behaviour should be prosecuted. But where resources are limited, governments should also prioritise cutting edge cases that advance or expand the application of the laws, and high impact cases that impact a large victim class—past, present, and future.

Prosecuting single-victim cases like *United States v. Calimlim*,² may provide precedent setting case law. The Filipina victim testified at trial for almost two days about her 19-years of isolation, constraining house rules, and constant threats of arrest, imprisonment, and deportation. Her testimony was corroborated by neighbours, the defendants' closest friends, the victim's parents, documents, and federal agents who videotaped the defendants' house. No physical violence nor threats of violence were employed to coerce the

² *United States v. Calimlim*, 538 F. 3d 706 (7th Cir. 2008). See also *United States v. Nnaji*, 47 Fed. Appx. 558 (5th Cir. 2011) (Nigerian domestic servitude case); *United States v. Dann*, 652 F. 3d 1160 (9th Cir. 2011) (Peruvian domestic servitude case).

victim to perform her duties and remain in the defendants' residence. Yet, the traffickers were convicted and ordered to pay over USD 900,000 in restitution. The appellate decision affirmed that deportation and financial threats were used to facilitate forced labour. Cases like *Calimlim* are frequently cited in non-violent coercion criminal and civil trafficking cases and support grassroots efforts to pass various US state Domestic Workers' Rights Bills.³

The impact of a large victim class case is obvious, but prosecution is challenging. Victims may have different recollections that may contradict each other. *United States v. Kil Soo Lee*, an American Samoa sweatshop slavery case, involved more than 200 Vietnamese and Chinese victims and numerous fact witnesses. All victims were interviewed, often several times, and 16 victims were brought back from Vietnam for trial. The case involved three dedicated prosecutors for two years, additional prosecutors, paralegals, and victim witness support, and over 30 federal agents. The trial lasted four months and featured over 16 victims' testimony, law enforcement and fact witnesses, physical evidence, and documents in five languages. The main defendant was convicted and sentenced to 40 years in prison. Over 200 victims remained in the United States, obtained immigration status, and reunited with their families.⁴ Although resource intensive, this case paved the way for criminal and civil cases against labour brokers and corporate entities systematically trafficking hundreds of workers in construction and hospitality industries.⁵

Trafficking prosecutions require dedication to understanding victim needs. In both cases above, significant resources were invested into working in a victim-centred, trauma-informed manner. Abandoning prosecution because the investigations and victims are 'too difficult', time consuming, and costly, for a cheaper and easier response abrogates the fundamental values established by the Trafficking Protocol. When resources are inadequate to investigate all reported and meritorious cases, strategic use of resources will result in more productive investigations and successful prosecutions.

³ See: *David v. Signal Int'l*, No. 08-1220 (E.D. La. filed 2008) (hundreds Indian construction workers trafficked, yielding USD 14 million jury damages).

⁴ *United States v. Kil Soo Lee*, 472 F.3d 638 (9th Cir. 2006). See also *United States v. Ramos*, No. 07-11558, 2008 WL 5125992 (11th Cir. Dec. 8, 2008) (investigation revealing over 800 workers victimised in citrus fields).

⁵ See: *David* and *United States v. Askarkbodjaev*, No.09-00143 (W.D. Mo. filed 2009) (hundreds of hospitality workers trafficked over 10 states).

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Resisting the Carceral: The need to align anti-trafficking efforts with movements for criminal justice reform

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Response to ATR Debate Proposition: ‘Prosecuting trafficking deflects attention from much more important responses and is anyway a waste of time and money’

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Common calls to action around human trafficking continue to urge greater law enforcement attention, increased arrests of traffickers, and more prosecutions. While prosecution of traffickers is not a waste of time or money in every instance, problems arise when anti-trafficking resources are predominantly directed to law enforcement. This approach, which we see all too often, ties efforts to a criminal justice system that is mired in dysfunction. In many instances, the prosecution-based model reveals itself as antithetical to principles of human and civil rights, ignores the reality that many trafficking survivors confront, and redirects the conversation away from important critique and reform. By prioritising prosecution above all else, this approach distances itself from contemporary efforts to build inclusive racial, economic and gender justice movements centred around broader criminal justice reform.

As attorneys on a team that defends nearly all of the people arrested for prostitution throughout New York City, and survivors of trafficking who are subject to arrest and prosecution in myriad other ways, we have witnessed firsthand the overreliance on prosecution centred models—and the way this negatively impacts both our clients and larger anti-trafficking efforts. We have observed wave after wave of policies, legislation, and media campaigns that prioritise a law enforcement approach to the issue of human trafficking and

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measure success only in the number of arrests made,¹ regardless of the quality of the arrests, the sustainability of the ensuing prosecutions, or whether victims view the process as a good thing. As the net widens, arrests follow, often of those who may only be tangentially involved in the trafficking, or may even be trafficked themselves. This ‘all or nothing’ paradigm misses the mark.

Many, but not all, of our clients have experienced the levels of force, fraud or coercion that would allow them to be considered ‘trafficking victims’ under the law. Though originally conceived as an anti-trafficking project, framing our work in terms of trafficking has become increasingly problematic as many of our clients’ trafficking experiences — while brutal — pale in comparison to the systemic failures and violence they have endured for far longer. The majority are hindered by these daunting obstacles related to their marginalisation, even once no longer trafficked.

Lack of employment opportunities, access to education and affordable housing means survivors, even those identified by law enforcement and participating in prosecutions, continue to struggle post-trafficking. For example, a survivor of trafficking into prostitution was forced to turn to law enforcement when, after leaving her trafficker, he petitioned for custody of their child. Her trafficker was then arrested and is currently awaiting trial. Although free from his immediate control, she continues to confront many of

¹ L Hersh, ‘To Eradicate Trafficking Prosecute the Pimps and the Buyers’, *Gotham Gazette*, 2 February 2016, <http://www.gothamgazette.com/index.php/opinion/6133-to-eradicate-sex-trafficking-prosecute-the-pimps-and-buyers>, retrieved 29 February 2016; K Moore, ‘Despite Outage, Sex Trafficking Arrests Rare in Metro Area’, *WWLTV.com*, 9 March 2015, <http://www.wwltv.com/story/news/2015/03/09/sex-trafficking-arrests-rare-in-metro-area/24677633/>, retrieved 29 February 2016. Calls for a prosecution-based approach are not limited to the United States. See: A Sparrow, ‘“Modern Slavery” Bill to Tighten Laws on Human Trafficking’, *The Guardian*, 28 August 2013 (British government officials lamenting the ‘shockingly low’ prosecution rates for human trafficking across Europe). Interestingly, the US Department of State’s annual *Trafficking in Persons Report* uses statistics on the number of prosecutions conducted when evaluating foreign governments’ efforts to comply with the ‘minimum standards for the elimination of trafficking’ found in Section 108 of the Trafficking Victims Protection Act. See: *Trafficking Victims Protection Act of 2000, Div. A of Pub. L. No. 106-386, § 108, as amended*. For a critique of this approach, see: Women’s Commission for Refugee Women and Children, ‘The US Response to Human Trafficking: An unbalanced approach’, May 2007, <https://www.womensrefugeecommission.org/resources/document/472-the-u-s-response-to-human-trafficking-an-unbalanced-approach?catid=239>, retrieved 29 February 2016. (Noting ‘at issue is the entire conceptual framework of trafficking as a law enforcement issue and only a law enforcement issue’.) See also: J Chuang, ‘The United States as Global Sheriff: Using unilateral sanctions to combat human trafficking’, *Michigan Journal of International Law*, vol. 27, 2006, pp. 437–494.

the same struggles that made her vulnerable to trafficking in the first place. She has no high school education, minimal family support, and now, she is saddled with a criminal record because of the conduct in which he compelled her to engage. She has limited time or resources to devote to her own healing and her lack of viable employment options further marginalise her, making raising her child extremely challenging. Stability in her life is further hindered by the sheer number of appointments required of her in order to receive meagre government assistance.

It is stories like these that we must keep in mind when constructing anti-trafficking policy. In order to truly help and empower survivors, we must first listen to them. Our clients seek access to a safe and living wage, opportunities for education, and affordable housing. They do not seek rescue at the hands of law enforcement or the court system. Yet, the loudest voices in the anti-trafficking movement continue to point to the criminal justice system as the place where the problem of human trafficking can be solved. It is these loudest voices, who insist on speaking for and about our clients, that fail to recognise the multiple ways our clients experience victimisation and violence, often as a result of poverty, homophobia, transphobia, racism, and sexism, and to consider how these larger systemic problems create vulnerability to exploitation and abuse. This failure increases the risk that anti-trafficking efforts result in the criminalisation of the very population purported to be its beneficiaries.

Trying to arrest our way out of a multi-faceted problem has failed before. Even where trafficking efforts may be understood as well-meaning, we will lose the ‘war’ on trafficking if we continue to fight it the same way we fought the war on drugs.² Both wars have overwhelmingly relied on the arrests of low-level offenders rather than perpetrators of more serious offences. As with the war against drugs, the collateral damage of anti-trafficking efforts that prioritise prosecution comes in the form of scores of arrests.

While the drug war resulted in the targeting of those possessing small amounts of controlled substances, the war on trafficking similarly targets individuals in the commercial sex industry for arrest—many of whom are trafficked into prostitution and many of whom are not. With commercial sex, while the media often touts

² E N Brown, ‘America’s Newest War,’ *POLITICO*, 1 June 2015, <http://www.politico.com/magazine/story/2015/06/justice-for-victims-of-sex-trafficking-war-on-crime-118512>, retrieved 3 December 2015.

the ‘success’ of sting operations aimed at rescuing victims,³ when unpacked, it is clear that these stings simply result in more arrests of people engaging in prostitution—ushering a steady flow of women (predominantly women of colour) into the clutches of the criminal justice system.⁴ The singular focus on prosecution exacerbates the already concerning power imbalance between law enforcement and those the law is crushingly enforced against.

More than that, when trafficking is framed as an individual act of violence into which the state must intervene, criminal prosecution becomes indispensable. This diverts attention from more difficult, but critical issues of state responsibility.⁵ If, instead, the state were required to take responsibility for the conditions that give rise to this abuse, we would see steps taken to eradicate poverty, provide safe and affordable housing, educate more widely, and dismantle oppressive systems across the board. However well-intentioned, wedding anti-trafficking efforts to our criminal systems means efforts end up exacerbating the harmful practices operating in criminal courts across the country—disproportionate arrests of people of colour, inadequately funded indigent defence systems, overreliance on jail and incarceration, and a lack of post-release services for those leaving prison. All of this serves to worsen conditions in certain communities, creating a fertile ground for exploitation and abuse in various labour sectors, including commercial sex.

³ For example, recent reports document a ‘two-week prostitution sting operation’ meant to ‘bring focus to human trafficking’ in the Houston, Texas, area. However, despite ‘successful operations’ that landed more than 60 individuals in jail on prostitution charges, the reports are silent as to any arrests of traffickers. See: B Price, ‘60 Arrested in Another Texas Prostitution Sting Aimed at Human Trafficking’, 6 November 2015, <http://www.breitbart.com/texas/2015/11/06/60-arrested-another-texas-prostitution-sting-aimed-human-trafficking/>; See also: Tribune Staff, ‘High School Teacher Among 95 Arrested in Polk Prostitution Sting, Deputies Say’, *The Tampa Tribune*, 14 December 2015, <http://www.tbo.com/news/crime/95-arrested-in-polk-prostitution-sting-deputies-say-20151214/> (noting over 95 arrests for prostitution and solicitation as a result of ‘Operation Naughty but Not Nice’, including ‘suspects’ as young as 15 years of age).

⁴ In 2014, our team witnessed this firsthand, when despite the lack of empirical evidence supporting the notion that trafficking into prostitution increases around large sporting events, prostitution arrest numbers jumped almost tenfold in the two weeks leading up to the Super Bowl, held in our jurisdiction. These arrests, all made by undercover officers acting as ‘Johns’, reflect an increase in police activity rather than an increase in prostitution activity. The scenario repeated itself during the 2015 NBA All Star Game, also held locally to us in February 2015. At that time we saw a huge spike in prostitution arrests for that weekend alone.

⁵ See: L. Beutin, ‘Criminalising Traffickers is an Alibi for State-Produced Vulnerability’, *Open Democracy*, 19 November 2015, <https://www.opendemocracy.net/beyondslavery/lyndsey-p-beutin/criminalising-traffickers-is-alibi-for-state-produced-vulnerability>

In the United States, we find ourselves in a critical, and long overdue, moment in criminal justice reform. Conversation and practice are shifting, and efforts to challenge racially motivated policing, police violence, mass incarceration, and our ‘cimmigration’⁶ system, are finally gaining traction.⁷ Continuing to place anti-trafficking efforts squarely within these systems counteracts this progress. Arrests and prosecutions done in the name of combating trafficking then work to fortify the very systems other social justice movements are rightfully working to reform.

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⁶ The term ‘cimmigration’ refers to the ‘criminalization of immigration law.... This convergence of immigration and criminal law brings to bear only the harshest elements of each area of law, and the apparatus of the state is used to expel from society those deemed criminally alien. The undesirable result is an ever-expanding population of the excluded and alienated.’ J Stumpf, ‘The Cimmigration Crisis: Immigrants, crime & sovereign power’, *American University Law Review*, vol. 56, 2006, pp. 376–78. See also: Y Vazquez, ‘Constructing Cimmigration: Latino subordination in a “post-racial” world’, *Ohio State Law Journal*, vol. 76, 2015, pp. 599–657.

⁷ See: ‘Stop and Frisk Attorneys Comment on Court Monitor’s Second Report’, 16 February 2016, <http://ccrjustice.org/home/press-center/press-releases/stop-and-frisk-attorneys-comment-court-monitor-s-second-report>. See also: D Graham, ‘A Year after Erik Garner’s Death: Has anything changed?’, 17 July 2015, <http://www.theatlantic.com/politics/archive/2015/07/eric-garner-anniversary/398837/>; D Ramsay, ‘Tracking Police Violence a Year after Ferguson’, 7 August 2016, <http://fivethirtyeight.com/features/ferguson-michael-brown-measuring-police-killings/>; J Swaine, O Laughland, and J Lartey, ‘Black Americans Killed By Police Twice as Likely to be Unarmed as White People’, 1 June 2015, <http://www.theguardian.com/us-news/2015/jun/01/black-americans-killed-by-police-analysis>; ‘Strange Bedfellows: Why are the Koch Brothers and Van Jones teaming up to end mass incarceration’, 15 July 2015, http://www.democracynow.org/2015/7/15/strange_bedfellows_why_are_the_koch; T Mak, ‘Koch Brothers to Bankroll Prison Reform’, 13 January 2016, <http://www.thedailybeast.com/articles/2015/01/13/koch-bros-to-bankroll-prison-reform.html>; P Baker, ‘Obama in Oklahoma, Takes Reform Message to the Prison Cell Block’, 16 July 2015, <http://www.nytimes.com/2015/07/17/us/obama-el-reno-oklahoma-prison.html>. For a critique of the ‘cimmigration’ system, see: M Fan, ‘The Case for Cimmigration Reform’, *North Carolina Law Review*, vol. 92, no. 1, 2013, pp. 101–169.

Not All Prosecutions are Created Equal: Less counting prosecutions, more making prosecutions count

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Response to ATR Debate Proposition: ‘Prosecuting trafficking deflects attention from much more important responses and is anyway a waste of time and money’

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Some prosecutions of human trafficking crimes are a waste of time and money. The trick is to make them count. Those who assert that prosecution wastes resources that are better spent elsewhere would generally divert them into protection and prevention efforts, namely the other ‘Ps’ in the ‘three P’ distillation of that neat trio of answers to questions of trafficking. But allowing traffickers to remain at large fails to prevent trafficking and inadequately protects victims. Prosecution, protection and prevention are not mutually exclusive. The question is not which of them should take priority, but how they can be pursued in a way that is mutually reinforcing.

In the myopic pro-prosecution camp are those who equate more prosecutions with greater success against trafficking. Those familiar with the United States Department of State *Trafficking in Persons Report* know that its tier ranking has attracted ire. Its methodology includes an assessment of ‘implementation of human trafficking laws through vigorous prosecution of the prevalent forms of trafficking in the country and sentencing of offenders’.¹ But quantitative measures of prosecution and conviction rates make simple what is necessarily complex, and compare what is essentially incomparable. What does it mean

¹ United States Department of State, *Trafficking in Persons Report 2014*, USDOS, 2015, p. 40, retrieved 6 May 2015, <http://www.state.gov/j/tip/rls/tiprpt/2014/index.htm>

for instance, that there are few trafficking prosecutions in a country where even murder goes largely unpursued? In a country where there are several prosecutions for trafficking, how can we know whether those convictions served to disrupt trafficking operations? Did trial processes respect the rights of the parties involved? Did convictions lead to compensation and restitution for victims, or are they now worse off? In assessing trafficking response, prosecutions “warts and all” can only offer quantitative insight.²

Those adverse to prosecution raise valid concerns. Victim participation in criminal justice processes can result in their re-victimisation where victim-centred approaches are lacking.³ In worst-case scenarios, victims’ protection needs may escalate as a result of their participation in trial processes, with little discernible benefit for them. Heavy reliance on victim testimony means that cases can fall apart, and can often mean that only low level criminals who victims come into contact with see the inside of a court room.⁴ Indeed, prosecutions achieve little towards protection or prevention where the best scenario is a successful conviction of replaceable components in a large and complex exploitation machine. These concerns underscore the need to weigh protection and prevention gains in setting prosecutorial priorities.

From a prevention perspective, already stretched prosecutorial resources should be allocated to where they can do the most damage to trafficking ventures. In practice, where convictions for offences under complex domestic trafficking laws would not succeed, prosecutors may elect to pursue alternative prosecutorial paths.⁵ A successful conviction for kidnapping, extortion, rape, assault, battery and organised crime may result in incarceration for 20 odd years. The prosecutor here is to be commended for her calculated decision to minimise risks to the outcome of the trial and to victims themselves, while still succeeding to disrupt the trafficking network by putting a key player out of play. Yet this conviction would not count as a ‘success’ in criminal justice response to human trafficking, while a conviction of a petty criminal for a crime that is sloppily branded as trafficking would. This injustice speaks to the need to do more than simplistically count prosecutions and categorise them by the forms of exploitation they confront; indeed, pressuring countries to do so may even be detrimental.

² *Global Report on Trafficking in Persons 2014*, UNODC, 2014, p. 18.

³ E Pearson, *Human Traffic Human Rights: Redefining victim protection*, Anti-Slavery International, London, 2002, pp. 50–53.

⁴ K Kangaspunta, ‘Was Trafficking in Persons Really Criminalised?’ *Anti-Trafficking Review*, issue 4, 2015, pp. 80–97, www.antitraffickingreview.org

⁵ See, for example: United Kingdom Crown Prosecution Services, *CPS Policy for Prosecuting Cases of Human Trafficking*, CPS, 2011, p. 12 and *Code for Crown Prosecutors*, CPS, 2013, p. 13.

From a protection point of view that puts victims' needs front and centre, access to justice must be upheld as a key component of a holistic response. Decisions to involve victims in prosecutions of their traffickers must be weighed against the risks posed to their safety and wellbeing, and to the trial outcome. In some cases, the more appropriate course from a victim's best interests perspective is to simply not prosecute traffickers. Such decisions should not be chalked up as prosecutorial failures but as protection successes. In other cases, doing what is in the best interests of the victim may mean empowering him or her to participate in the criminal justice process against traffickers.

Prosecution of human trafficking is costly and requires resources that could be invested elsewhere. This is true for all prosecutions of complex crimes, but should not lead to the conclusion that we need not bother. To abandon the attempt to end impunity for traffickers is to disregard one of the key *raison d'être* of the *Protocol to Prevent, Suppress and Punish Trafficking in Persons*, being to protect victims in legal proceedings against traffickers.⁶ Luis CdeBaca, US Ambassador-at-Large to Monitor and Combat Trafficking in Persons, recalls a comment made by a victim on seeing the perpetrator at court: "He looks so small," she said.⁷ How can victims of trafficking triumph over traffickers unless they are supported to bring them to justice? In doing so, emphasis should not be on simply increasing the number of prosecutions counted as 'trafficking' prosecutions, but on making them count by measuring their value by the extent to which protection and prevention objectives are also served.

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⁶ Emphasis added, UN General Assembly, *Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, Supplementing the United Nations Convention against Transnational Organized Crime*, 15 November 2000, Article 6.

⁷ United States Department of State, p. 3.

Villains and Victims, but No Workers: Why a prosecution-focussed approach to human trafficking fails trafficked persons

Inga Thiemann

Response to ATR Debate Proposition: ‘Prosecuting trafficking deflects attention from much more important responses and is anyway a waste of time and money’

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The focus on prosecutions in anti-trafficking responses sets trafficking up as a criminal act with two polar opposites, the trafficker as the perpetrator and the trafficked person as the victim. This approach is problematic, as it ignores the complex interplay of economic inequalities between countries of origin and destination countries, as well as the role of destination countries’ immigration controls and labour regulations in creating the conditions which render people vulnerable to human trafficking.¹ While other crimes such as domestic violence or sexual violence in conflict have strong structural dimensions, counter-trafficking policies can be particularly problematic, as they not only obscure structural issues but sometimes actively contribute to measures which render certain groups more vulnerable.²

¹ For more information on the diverse impact of immigration policies in countries of destination on migrants’ rights, see: B Anderson, *Us and Them? The dangerous politics of immigration control*, OUP, Oxford, 2013; R Andrijasevic and B Anderson, ‘Conflicts of Mobility: Migration, labour and political subjectivities’, *Subjectivity*, vol. 29, 2009.

² For a more detailed discussion, see: R Andrijasevic and B Anderson, ‘Anti-Trafficking Campaigns: Decent? Honest? Truthful?’, *Feminist Review*, vol. 92, 2009, p. 151; R Andrijasevic, ‘Beautiful Dead Bodies: Gender, migration and representation in anti-trafficking campaigns’, *Feminist Review*, vol. 86, 2007, p. 24.

Immigration is restricted in most destination countries for human trafficking, but there is nonetheless demand for cheap and exploitable labour. Exploitable labour is characterised as labour which is paid below national minimum wage standards, exceeds regular workers' permitted working hours, and is easily retained. Foreign nationals are more likely to be exploitable as they have fewer opportunities to change their occupation or their employer: regular migrant workers are often tied to their employer through their work permits, whereas irregular migrants are likely to stay with their employer due to fears of deportation and lack of other options.³

In certain sectors, even citizen employees lack labour protections and are particularly vulnerable to exploitation. These sectors include sex work, which in most countries is not considered to be work at all, as well as domestic work, certain types of care work and agricultural work, all of which are exempt from labour regulations and lack possibilities for collective bargaining. Equally, female workers are more vulnerable. They are often disempowered vis-à-vis their employers due to lesser protections in part-time or short-term work,⁴ different remuneration levels for men and women and a greater risk of sexual violence and harassment at the workplace. Thus, female migrant workers who enter labour sectors with low labour protections are at a heightened risk of exploitation, particularly if they engage in domestic care work or sex work, as these categories of work are almost invariably exempt from laws and regulations that impose obligations on employers and protect workers.

Unsurprisingly, people are trafficked almost exclusively into those professions and industries in which labour protections are fragmented or non-existent.⁵ Furthermore, a lot of the challenges faced by trafficked persons are similar to those encountered by irregular migrants. While the divisions are clear in theory, the threshold between what constitutes human trafficking, migrant

³ Andrijasevic and Anderson, p. 152.

⁴ L F Vosko, *Managing the Margins: Gender, citizenship, and the international regulation of precarious employment*, OUP Oxford 2009, pp. 19–20; See also S Fredman, 'Women at Work: The broken promise of flexicurity', *Industrial Law Journal*, vol. 33, 2004, p. 299.

⁵ For example, trafficking continues to be problematic in areas such as domestic work, agricultural work and sex work, which are often under-regulated or lacking in legislative protection, see e.g. J Fudge, 'Precarious Migrant Status and Precarious Employment: The paradox of international rights for migrant workers', *Comparative Labor Law & Policy Journal*, vol. 34, issue 1, 2012; V Mantouvalou, 'Human Rights for Precarious Workers: The legislative precariousness of domestic labor', *Comparative Labor Law & Policy Journal*, vol. 34, issue 1, 2012; T Sanders and K Hardy, 'Sex Work: The ultimate precarious labour?' *Criminal Justice Matters*, vol. 93, 2013.

smuggling and even regular migration is blurry.⁶ It is therefore important to question the line that is drawn between voluntary migration and human trafficking and to view exploitation and vulnerability on a continuum, rather than as clearly identified categories.⁷

Immigration laws and policies often aim at more tightly controlled borders, more restrictive visa regulations as well as more extensive police investigations and raids, claiming that they will control or at least deter trafficking by reducing irregular migratory processes.⁸ This approach legitimises government agencies' continued focus on border control and immigration regimes and ignores that trafficked persons often suffer the highest level of exploitation after their arrival in the destination country, not before or during their journey.⁹ Stronger borders are likely to force migration further underground, rather than prevent irregular migration and human trafficking. More clandestine movement increases the potential violence and abuse to which migrants, particularly women, are subjected, and makes facilitating cross-border movement, forced labour and exploitative practices both necessary and more profitable.¹⁰

Focussing on trafficking as a category distinct from other forms of migration restricts the problem to the crimes perpetrated by traffickers and employers, who exploit trafficked persons' limited access to their basic human rights. However, these limitations are not *imposed* by the traffickers, but are in fact due to immigration restrictions and the lack of labour protections for migrant workers. Indeed, these are the main sources of all migrants' vulnerabilities to

⁶ J O'Connell Davidson, 'New Slavery, Old Binaries: Human trafficking and the borders of "freedom"', *Global Networks*, vol. 10, 2010, p. 244, p. 249; I van Liempt, *Navigating Borders: Inside perspectives on the process of human smuggling into the Netherlands*, Amsterdam University Press, 2007, pp. 40–41; A T Gallagher, 'Recent Legal Developments in the Field of Human Trafficking: A critical review of the 2005 European Convention and Related Instruments', *European Journal of Migration and Law*, vol. 8, 2006, p. 163, 166.

⁷ J O'Connell Davidson, pp. 249–251.

⁸ A Lepp, 'Trafficking in Women and the Feminization of Migration: The Canadian context' *Canadian Woman Studies*, vol. 21, 2002, p. 96; B Anderson and R Andrijasevic, 'Sex, Slaves and Citizens: The politics of anti-trafficking', *Soundings*, 2008, p. 135, 144.

⁹ R Andrijasevic, *Migration, Agency and Citizenship in Sex Trafficking*, Palgrave Macmillan, Basingstoke/New York, 2010, pp. 19–20, 83–87; A T Gallagher, 'Trafficking, Smuggling and Human Rights: Tricks and treaties.', *Forced Migration Review*, vol.12. no. 8, 2002.

¹⁰ A Lepp, 'Trafficking in Women and the Feminization of Migration', *Canadian Woman Studies/Les Cahiers de la Femme*, volumes 21/22, numbers 4/1, p. 96; B Anderson and R Andrijasevic, 'Sex, Slaves and Citizens: The politics of anti-trafficking', p. 144.

precarious working and living conditions.¹¹ Traffickers merely exploit this structural problem.

The response to human trafficking and exploitation of migrant workers despite stronger border controls has been to focus on prosecuting the intermediaries who benefit from supplying trafficked persons' labour to an employer. This focus on prosecutions allows states to be perceived as 'doing something' to prevent the exceptional crime of human trafficking. It also allows for the category of a 'victim of trafficking', who has temporary and conditional rights as a victim of a crime until the time he or she is needed for criminal proceedings. Such an approach normalises trafficked persons' status as aliens who are by default excluded from labour rights and human rights.¹² Obscuring the connection between trafficking, immigration controls and labour rights prevents a rights-based approach, which protects the human rights, including labour rights, of all workers.¹³

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¹¹ C Costello, 'Migrants and Forced Labour: A labour law response' in A Bogg et al. (eds), *The Autonomy of Labour Law*, Hart, Oxford/Oregon, 2015.

¹² Anderson and Andrijasevic, 'Sex, Slaves and Citizens'.

¹³ H Shamir, 'A Labor Paradigm for Human Trafficking', *UCLA Law Review*, vol. 60, 2012; C Costello and M Freedland, *Migrants at Work*, OUP, Oxford, 2014.

Innocent Traffickers, Guilty Victims: The case for prosecuting so-called ‘bottom girls’ in the United States

Alexandra F Levy

Response to ATR Debate Proposition: ‘Prosecuting trafficking deflects attention from much more important responses and is anyway a waste of time and money’

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In January 2013, two 14-year-old girls reported to police that Derrick Hayes and Keosha Jones were forcing them to sell sex.¹ Jones was in charge of most of the logistics: she advertised the victims’ services on www.backpage.com, coordinated meetings between the victims and customers, and collected the \$100 to \$200 per day that the victims earned. She was also instrumental in keeping the girls compliant. One victim told the police that she believed, quite simply, that Jones would kill her if she stopped making money.

Hayes and Jones were both charged with human trafficking in federal court, and both pleaded guilty. However, there was a significant difference between their sentences: while Hayes got 30 years in prison, Jones was put on supervised release. The judge noted that although Jones was, by her own admission, a human trafficker—although she had, in stark terms, facilitated the rape of children for money—she was also a victim. Indeed, her initiation into the sex industry had taken place when she was just one year older than her own victims and, furthermore, it had occurred at the hands of Hayes, her co-conspirator (he beat her, drugged her, and forced her to have sex for money). The clear and direct link between Jones’s crime and Hayes’s brutality—along with her willingness to testify against Hayes, and her overall commitment to self-reform and rehabilitation—convinced the court to be lenient.

¹ See generally *US v. Jones*, 13-cr-00442 (M.D.Fla.)

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Jones occupied an organisational position well-known to law enforcement officials across the United States: she was, in industry terms, Hayes's 'bottom girl'. As defined in one federal criminal complaint:

'Bottom Girl' is the street term for a woman who sits atop the hierarchy of prostitutes working for a particular pimp. A bottom girl is usually the prostitute who has been with the pimp the longest and consistently makes the most money. Being the bottom girl gives the prostitute status and power over the other women working for the pimp; however the bottom girl also bears many responsibilities. In *US v. Pipkins*, 378 F.3d 1281 (11th Cir. 2004), the Eleventh Circuit described the bottom girl's duties as 'work[ing] the track in [her pimp's] stead, running interference for and collecting money from the pimp's other prostitutes, [and] look[ing] after the pimp's affairs if the pimp was out of town, incarcerated, or otherwise unavailable'.²

Like many women in this role, Jones had significant responsibilities: for example, she recruited other girls into the sex trade, managed day-to-day operations, and delivered all profits (including, notably, those from her own commercial sexual activity) to Hayes. In cases (such as Jones's) in which commercial sex is procured through trafficking (i.e. the sex work is performed by minors, or is compelled through force, fraud, or coercion), 'bottom girls' often occupy two dissonant roles: they are both traffickers and trafficking victims. This presents a vexing legal question, one at odds with criminal law's affinity for clear boundaries between guilt and innocence: how should the law treat innocent traffickers, guilty victims?³

² Criminal Complaint at 4, *United States v. Eric Antwan Bell*, 8:12-cr-00124-JSM-EAJ (M.D.Fla., Jan. 3, 2011), ECF No. 1. See also Criminal Complaint at 1, *US v. Christopher Tyrone Young*, 8:09-mj-00158-DUTY, (C.D.Cal., Apr. 13, 2009), ECF No. 1 ('Based on my training and experience, "bottom girl" is a title given to a prostitute who is the most trusted by the pimp. The bottom girl may be assigned tasks such as recruiting other prostitutes, transporting other prostitutes to and from areas where they work, and other tasks...'), Second Superseding Indictment, *US v. Derwin Samuel Smith* at 1, 1:10-cr-00583 (D.Md., Feb. 1, 2011), ECF No. 35 ('A "bottom girl" is considered to be an individual who works closely to the pimp and is typically in charge of the stable of girls that work for him.').

³ Common law defences, such as necessity and duress, generally require a threat of immediate harm, and therefore are not applicable to many human trafficking situations.

The status quo is to prosecute such women as traffickers—usually as co-defendants with the men who have allegedly trafficked them. It is tempting to reject this approach out of hand, tempting to object to the underlying premise that trafficking victims have enough self-determination to be guilty of *anything*, much less voluntary acquiescence to their traffickers’ demands. Punishing them seems both unjust as a matter of principle and impractical as a matter of policy: people who have no choice but to break the law cannot be deterred, so why bother?

One outspoken critic of the prosecutorial approach is Shamere McKenzie, a trafficking survivor and self-identified former ‘bottom girl’.⁴ She has publicly called for the cessation of prosecutions of women in this situation for trafficking and related offences, challenging prosecutors to ‘understand that [the] bottom girl is the one who’s the most victimized; [that’s] why she’s even in the position...in the first place’.⁵ In other words, the fact that these women have power and status *within* the organisation is not incompatible with the notion that they are actually unable to leave; to the contrary, traffickers can seek to maintain control by strategically meting out power and status to those who are most submissive. Though the intuition may be that more participation in the enterprise means more actual agency—and thus more grounds for punishment—McKenzie argues that the opposite is actually true.

McKenzie accurately described Keosha Jones’s plight: the intensification of Jones’s involvement with Hayes sounded in capitulation, not empowerment. But an analysis of more federal cases against women in these positions suggests that McKenzie’s theory cannot be fully generalised. In *US v. Robinson*, for example, the defendant who was a ‘bottom girl’—Anniesha Whitt—allegedly got the male defendant involved in the sex trade; she also exerted significant control over their operations.⁶ Though Whitt and Jones had the same basic job, their different levels of actual agency call for different legal responses.

⁴ See: S McKenzie, ‘Unavoidable Destiny | Legally a Criminal, Legally a Victim: The plight of the bottom’, Shared Hope, 24 May 2012, available at <http://sharedhope.org/2012/05/24/unavoidable-destiny-legally-a-criminal-legally-a-victim-the-plight-of-the-bottom/> (referring to “bottom girls” who are charged...like I was’), retrieved 3 April 2016.

⁵ ‘Restorative Justice and Human Trafficking—from Wisconsin to the World’, panel presentation, <https://law-media.marquette.edu/Mediasite/Play/9da2e13c4b4c481da48c89c3e31e98151d>, retrieved 16 April 2016.

⁶ See generally: *US v. Reynolds*, 10-cr-00463 (N.D. Ohio).

What becomes clear is that there is no single solution to this issue. Some women involved in trafficking operations in these ways deserve leniency, like Jones; others are no less autonomous and culpable than traffickers who entered the trade voluntarily. But the fact that some people are not guilty of trafficking does not make prosecution the wrong approach: to the contrary, it suggests that prosecution is important. A criminal action, with its procedural safeguards and fact-intensive inquiry, is the appropriate context within which to make a determination of culpability. When women in these positions are on trial, courts must take care to consider voluntariness—and must use their discretion to deviate from sentencing guidelines, order treatment, or find other ways of accommodating the ‘unusual situation in which the defendant was herself, a victim as well as a perpetrator, of the same types of crimes’.⁷ Complexity in such cases is inevitable. The answer is not to avoid prosecution, but rather to use the courtroom as a forum for the thorny, fact-specific question of how to treat guilty victims under the law.

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⁷ Government’s Sentencing Position; Response to Presentence Report, *US v. Alberti*, 12-cr-00057 (C.D.Cal., Document 170).

Human Rights and Economic Opportunity Will End Trafficking

Jubu Thukral

Response to ATR Debate Proposition: ‘Prosecuting trafficking deflects attention from much more important responses and is anyway a waste of time and money’

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This statement by the editors of this issue on the place of prosecution in ending human trafficking is of course hyperbolic, but it points to a basic truth about different strategies to protect human rights around the world. The ultimate goal in any anti-trafficking work should be twofold: preventing trafficking from happening in the first place; and helping survivors reclaim their voices and their lives so they can define how they want to move forward. Engaged audiences care about trafficking as a global issue and find it horrifying because it violates a shared hope—dignity for all people—and the communal belief that everyone deserves a chance to thrive and seek opportunity in life.

Prosecutors and law enforcement do have a role to play in addressing trafficking, in those instances where victims and survivors affirmatively decide they want a criminal justice intervention. But victims and survivors of trafficking, as with people who have survived other violent crimes like domestic violence,¹ have very mixed views² on whether they want law enforcement involvement in their situations, viewing the police themselves as

¹ A Melbin, A Jordan, and K Fels Smyth, *How Do Survivors Define Success? A new project to address an overlooked question*, The Full Frame Initiative, Greenfield, 2014.

² M Ditmore, *The Use of Raids to Fight Trafficking in Persons*, Sex Workers Project, New York, 2009.

dangerous. Survivors rarely prioritise jailing of abusers over the opportunity to move on, seeking economic stability and protection of their own human rights. In fact, in the arena of anti-trafficking efforts, law enforcement has a history of engaging in raids that are not properly investigated. Instead, the raids focus on sex work and prostitution without evidence of coercion, making unfounded assumptions about the prevalence of trafficking.³

Law enforcement interventions do, at times, help survivors leave a dangerous situation. And if police and prosecutors work closely with communities affected by trafficking, they can close down some trafficking networks and help survivors connect with social workers and lawyers. But ‘help’ is not always well directed and the results can be disappointing, lacking in quality, or even dangerous. In the United States, some sectors of the criminal justice system also seek to provide services and job training for people believed to be survivors of trafficking. For example, in New York, specific courts are designated as Human Trafficking Intervention Courts, where people arrested on prostitution-related charges are referred to support programmes of varying quality and success.⁴ However, it is not clear at all that the people arrested are actually trafficked, or that they welcome this help being offered. This approach rarely leads to long-term economic opportunity for survivors, as the criminal justice system is poorly situated to enhance job opportunities for victims and survivors of abuse, and has never developed a strong track record in this area. This means that without significant financial investment from other sectors of government and from civil society, survivors and their families are left in precarious economic conditions, leaving them in vulnerable situations where they are at risk of being trafficked yet again, or at a minimum, going on to work in exploitative conditions.

For this reason, prioritising anti-trafficking funding towards solutions enhancing economic opportunity and safety in migration are the key levers for

³ M Ditmore and J Thukral, ‘Accountability and the Use of Raids to Fight Trafficking’, *Anti-Trafficking Review*, issue 1, 2012, pp. 134–148, www.antitraffickingreview.org

⁴ M Chen, *Why Do Sex-Work Diversion Programs Fail?*, *The Nation*, September 2015, <http://www.thenation.com/article/why-do-sex-work-diversion-programs-fail>, retrieved 22 March 2016.

preventing and addressing trafficking over the long term. This reality is often ignored in salacious media depictions of trafficking and in the way even many anti-trafficking groups depict the dynamics of trafficking. Because it is necessary to create greater understanding of these solutions, the New York Anti-Trafficking Network⁵ has developed a #TalkTraffic video series,⁶ to educate audiences who have ‘had [their] awareness raised’ about trafficking, and are now trying to learn more about its nuances and complexities. The videos explain that in order to truly end trafficking, and to support and respect survivors, it is absolutely crucial to respond to trafficking using a human rights approach.⁷ Within a human rights framework, the state will protect people from violence and abuse, and refrain from having state actors such as the police engage in violence and abuse. A human rights framework also includes respecting the dignity and self-determination of the person who may be a victim or survivor, and ensuring the person at risk can make his or her own decisions about how to address the situation causing harm. Almost none of the interactions law enforcement has with victims and survivors meet these requirements. For example, there is great concern in the media about trafficking into the sex trade, creating large levels of support for police to intervene, but sex workers around the world regularly experience police abuse,⁸ meaning there is little trust the police will help them.

As with all social and human rights issues, it is crucial to focus inevitably limited resources on the most promising solutions. In this context, there is no need to emphasise a strong focus on law enforcement and prosecution, as the return on such investment is generally limited. Investigations and prosecutions are expensive, and they often do not target individuals who are most culpable for bad behaviour. Criminal justice interventions cannot guarantee an outcome that actually helps a victim or survivor move forward in life, particularly as most people who experience trafficking are not interested in seeking restitution through prosecution. The reality of trafficking is that prevention is key. Anti-trafficking work therefore requires all actors to address

⁵ New York Anti-Trafficking Network (NYATN), <http://nyatn.org/>

⁶ Ending Trafficking: #TalkTraffic video series, New York Anti-Trafficking Network, 2015, <http://nyatn.org/talktraffic/>

⁷ #TalkTraffic: Human rights approach, New York Anti-Trafficking Network, 2015, <http://nyatn.org/2015/06/29/human-rights-approach/>

⁸ C Mgbako, ‘Police Abuse of Sex Workers: A global reality, widely ignored’, *RH Reality Check*, 15 December 2011.

the issues that lead to situations that put people at risk for trafficking in the first place. These long-term solutions⁹ include: safe and affordable housing; supportive and qualified legal and social services; common sense immigration policy; living wage jobs, opportunities to build financial assets, and anti-poverty policies; supporting low-wage workers organising for their rights; sexuality education, which survivors say would have helped them navigate vulnerable situations; reducing reliance on the criminal justice system and removing heavy oversight by law enforcement, which is costly and is not working as a tool of deterrence or reintegration; safe, qualified, and appropriate services and housing for LGBTQ young people, especially those at risk for homelessness and/or family rejection; promoting a global culture that values women and girls; protecting fair working conditions and labour rights; protecting human rights; and transparency and accountability in supply chains for goods and services.

The ‘time and money’ governments and NGOs spend on trafficking is spent most wisely on these efforts. While law enforcement and prosecutors can be important partners in this work, the criminal justice approach is only a small part of the path forward, and is a costly one at that.

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⁹ #TalkTraffic: Solutions to end trafficking, New York Anti-Trafficking Network, 2015, <http://nyatn.org/2015/06/29/human-rights-approach/>

Palermo's Promise: Victims' rights and human trafficking

Martina E Vandenberg

Response to ATR Debate Proposition: 'Prosecuting trafficking deflects attention from much more important responses and is anyway a waste of time and money'

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Two hundred and forty months. Life without parole. Often, prosecutors in the United States measure their success in criminal trafficking cases by the long sentences meted out to the perpetrators. But prison sentences alone are not the appropriate measure.

The Trafficking Protocol declares, 'Each State Party shall ensure that its domestic legal system contains measures that offer victims of trafficking in persons the possibility of obtaining compensation for damage suffered.'¹ Criminal prosecution, *if done well*, can serve this purpose. Indeed, U.S. law requires restitution for trafficking victims in federal prosecutions.² In cases that include restitution for trafficking victims, success is not counted only in months of imprisonment, but also in dollars awarded: USD 3,892,055 in restitution to four minor victims of sex trafficking;³ USD 916,635.16 for one worker held for 19 years in domestic servitude;⁴ USD 51,844.00 for one victim forced to labour in a restaurant.⁵

¹ UN General Assembly, *Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, Supplementing the United Nations Convention against Transnational Organized Crime*, 15 November 2000, (Trafficking Protocol) Article 6(6).

² 18 U.S.C. §1593.

³ *United States v. Lewis*, Case No. 09-cr-00213 (D.D.C.).

⁴ *United States v. Calimlim*, Case No. 04-CR-248 (E.D. Wis.).

⁵ *United States v. Tran*, Case No. 14-CR-00025 (D. Minn.).

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Advocates for trafficking victims are beginning to fight for these restitution orders for their clients. Their advocacy is beginning to show dividends. And thanks to the University of Michigan Trafficking Law Clinic, restitution awards for trafficking victims are not subject to taxation. The Clinic succeeded in convincing the US authorities to declare that criminal restitution for trafficking victims should not be subject to federal income tax.⁶

Why does this matter? Prosecutions can provide a mechanism for trafficking victims to rebuild their lives. Financial compensation obtained through criminal prosecution can catapult a trafficking victim forward on the path to survival. It can preempt the need for civil litigation. It can restore dignity to a trafficking victim unable to support his or her family. It can provide the financial wherewithal for a trafficking victim to thrive, not just survive. Funds obtained through restitution orders may be used to go to college, to buy a home, to purchase a car, to support family members at home. Prosecution with restitution takes a step beyond punishment and retribution.

Prosecution can be a form of restorative justice, returning through restitution the value of the labour stolen from trafficking victims. Victim-centred prosecution can holistically address the harms perpetrated by the traffickers. And in the US, advocates for trafficking victims have seen the transformative power of restitution. Long prison sentences are not enough.

Moreover, restitution through prosecution may serve another fundamental purpose: deterrence. While many traffickers view prison time with equanimity, federal prosecutors report that seizure of assets hits traffickers where it hurts. Restitution punishes these defendants, stripping traffickers of their ill-gotten gains. Prosecutions pave the way for assets to be returned to their rightful owners, the victims who earned the money.

The fight against human trafficking calls for a careful allocation of scarce resources. Critics of criminal prosecution often note that criminal proceedings are costly; their rewards are speculative; and victims are frequently compelled to participate as witnesses against their will and at great personal cost. Other critics point to the myopic prosecution focus on sex trafficking, to the detriment of labour trafficking victims. Still others lament the miniscule number of prosecutions: for example, in all of 2014, there were only 208 federal trafficking prosecutions brought in the US, of which just 18 were for

⁶ US Treasury Notice 2012–12, <https://www.irs.gov/pub/irs-drop/n-12-12.pdf>

forced labour.⁷ While these criticisms are valid, critics ignore the potential for empowerment of victims through prosecution. Some victims testifying against their traffickers gain confidence. Those supported by skilled *pro bono* or NGO attorneys can regain a sense of power over their own lives. And, when courts order restitution, trafficking victims can finally recover the money that they are owed.

The key phrase above is, of course, *if done well*. In practice, the significant potential for restorative justice through criminal restitution is hamstrung by courts' failure to follow the law. Despite the fact that restitution is mandatory, that courts are *required* to order restitution under the law, U.S. federal courts rarely order restitution.⁸ Why?

This alarming fact may be explained, at least in part, by the false dichotomy between victim advocacy and criminal enforcement. Those providing social services may sometimes advocate for victims to opt out of the criminal justice system entirely, avoiding cooperation in a criminal case. The priority may be to seek social services and relief *exclusively* outside of court. But this approach leaves victims without representation or assistance during criminal proceedings. And while the best prosecutors take a victim-centred approach, others, as well as the judges overseeing the criminal cases, are frequently oblivious to their direct legal obligations to victims. The abysmal result is that defendants get to keep what they stole; victims remain penniless; and under-funded public-interest organisations are saddled with the costs of caring for victims.

Prosecuting trafficking is not just about punishing traffickers: it is also about securing victims' rights. The fact that prosecution does not yet fulfil this role in all cases should be viewed as a failure of *execution*. This failure can be addressed, at least in part, by enhanced training programmes aimed at

⁷ US Department of State, *Trafficking in Persons Report 2015*, US Chapter, p. 353.

⁸ See generally: The Human Trafficking Pro Bono Legal Center and WilmerHale, 'When "Mandatory" Does Not Mean Mandatory: Failure to obtain criminal restitution in federal prosecution of human trafficking in the United States', The Human Trafficking Pro Bono Legal Center and WilmerHale, 2014.

building capacity of prosecutors to protect the full array of victims' rights, combined with improved legal representation of trafficking victims. The recent Justice for Trafficking Victims Act, passed by Congress with great fanfare in 2015, includes mandatory training for judges and prosecutors on mandatory restitution.⁹ The law also requires the federal government to use forfeited assets to pay restitution to victims.¹⁰

International treaties and conventions have long recognised the importance of compensating victims.¹¹ The United States Congress put the weight of the law behind this right when it required that federal courts order restitution to trafficking victims in the course of criminal proceedings. All that is left is for courts to follow the law. And when they do, criminal prosecutions will be the most effective—and not just the most promising—weapon in the arsenal against human trafficking.

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⁹ Sections 114(c)(1)(B) & (C), Justice for Victims of Trafficking Act of 2015, Public Law No: 114–22 (05/29/2015).

¹⁰ Section 105(a), Justice for Victims of Trafficking Act of 2015, Public Law No: 114–22 (05/29/2015).

¹¹ See: Trafficking Protocol.

ANTI-TRAFFICKING REVIEW

Guidelines for Contributors

We welcome submissions from a diverse range of actors, including academics, practitioners, trafficked persons and advocates. The *Anti-Trafficking Review* particularly welcomes contributions from those with direct experiences and insights to share.

The *Anti-Trafficking Review* is aimed at a wide readership. It therefore encourages submissions that are in clear, jargon-free English with appropriate but not excessive citation.

Articles should be previously unpublished and should not be under consideration for publication elsewhere. All articles go through a rigorous double-blind peer review process.

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The Anti-Trafficking Review promotes a human rights-based approach to anti-trafficking. It explores trafficking in its broader context including gender analyses and intersections with labour and migrant rights. It offers an outlet and space for dialogue between academics, practitioners, trafficked persons and advocates seeking to communicate new ideas and findings to those working for and with trafficked persons.



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